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Supreme Court, U.S.
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In the

# Supreme Court of the United States

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FRANK ADAMS & CO., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

and

BALTIMORE & OHIO RAILROAD CO., ET AL.,
Intervening Defendants.

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On Appeal from the United States District Court for the Southern District of Ohio, Western Division

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## JURISDICTIONAL STATEMENT

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October Term, 1963

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**On Appeal from the United States District Court for the Southern District of Ohio, Western Division**

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## JURISDICTIONAL STATEMENT

Appellants appeal from the order of the three-judge United States District Court for the Southern District of Ohio, Western Division, dismissing appellants' complaint to set aside and enjoin an order of the Interstate Commerce Commission, and submit this statement to show that the

Supreme Court of the United States has jurisdiction of the appeal, and that substantial issues of great importance are presented.

## OPINION BELOW

The decision of the three-judge District Court is not yet reported. Copies of the opinion and order of the District Court are attached hereto as Appendices A and B respectively. The April 2, 1962 decision of the Interstate Commerce Commission is reported at 316 I.C.C. 55.

## JURISDICTION

Appellants filed a complaint on June 25, 1962, pursuant to Title 28, United States Code, Sections 1336, 1398, 2284 and 2321 through 2325, to set aside and enjoin an order of the Interstate Commerce Commission. The opinion and order of the District Court was entered May 8, 1963. Notice of appeal was filed in that Court on July 1, 1963, and on August 12, 1963, Judge John W. Peck of that Court granted an extension of time in which to docket this appeal to the Supreme Court to and including September 30, 1963.

The Supreme Court has jurisdiction to review the decision of the three-judge District Court by direct appeal by virtue of Title 28, United States Code, Sections 1253 and 2101(b) and Title 49, United States Code, Section 45. The following cases sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Interstate Commerce Commission, et al* v. *City of Jersey City, et al*, 322 U. S. 503; *Interstate Commerce Commission, et al* v. *Hoboken Manufacturers' Railroad Co.*, 320 U. S. 368, rehearing denied, 321 U. S. 801; *Alton Railroad Co.* v. *United States, et al*, 287 U. S. 229, and *Baltimore & Ohio Railroad Co., et al* v. *United States, et al*, 298 U. S. 349.

## QUESTIONS PRESENTED

1. Are rates on scrap iron in Eastern Territory unreasonable in violation of Section 1(4) and (5) of the Interstate Commerce Act; unduly preferential to iron ore and unduly prejudicial to scrap iron, in violation of Section 3(1) of the Interstate Commerce Act; and contrary to rate-making prescriptions established and maintained by the Interstate Commerce Commission for thirty-four years?

2. Did the hearing examiner in the proceedings before the Interstate Commerce Commission err in restricting the appellants from cross-examining witnesses appearing voluntarily on behalf of certain interveners, on the ground that said interveners' witnesses could plead that the testimony sought to be elicited on cross-examination was confidential information?

3. Were certain admitted errors committed by the Interstate Commerce Commission in the proceedings before the Commission and in the United States District Court so prejudicial and material as to prevent the Commission from forming a rational basis for its ultimate conclusions; or were such admitted errors so flagrant and irresponsibly repeated after having been cited to the Commission by the appellants as to indicate that the Commission's decision was arbitrary and unreasonable, that the appellants did not receive a fair hearing, and were denied due process of law?

## STATUTES INVOLVED

The statutes involved in this case, Sections 1(4) and (5) and 3(1) of the Interstate Commerce Act, as amended, [49 United States Code, Sections 1(4), (5) and 3(1)], and Section 7(c) of the Administrative Procedure Act [5 United States Code, Section1006(c)] are set forth in Appendix C attached hereto.

## STATEMENT

This litigation involves an attack by the scrap iron and scrap steel industry against the freight rate structure maintained by the Class I railroads in Eastern Territory on scrap iron and scrap steel (hereinafter referred to as "scrap").

The 360 appellants, listed in Appendix D herein, constitute the major processers and shippers of scrap in Eastern Territory. ("Eastern Territory" or "Official Territory", as it is also termed, generally includes the area east of the Mississippi River and north of the Ohio and Potomac Rivers.)

Appellant, Institute of Scrap Iron & Steel, Inc., is the national trade association of the scrap industry, comprised of approximately 1,100 of the leading processers and shippers of scrap in the United States.

The 360 individual appellants purchase unprepared scrap having no commercial value, which they process and refine for sale to steel mills and foundries to be remelted into new steel. Each steel producer also generates its own scrap as a by-product of manufacturing new steel. Scrap generated by steel producers is referred to in the trade as "home scrap", while scrap sold to steel producers by the appellants is referred to as "purchased" or "dealer" scrap. Of the total scrap consumed, approximately one-half is dealer scrap.

The only other metallic raw material used to manufacture new steel is smelted iron ore, known commonly in its molten state as "hot metal" and in its solid state as "pig iron". Generally, one ton of scrap (either dealer, home, or mixed) is consumed for every two tons of new steel produced. Dealer scrap is shipped both in its unprepared condition to scrap dealers and in its processed condition to steel producers, primarily by rail and to a lesser, but increasing, extent by truck, barge and lake steamer. Iron ore is shipped solely by rail and water transportation.

The scrap industry is extremely important to the national economy and vital to the national defense in times of war or national emergency. In 1956, 35,109,000 gross tons of dealer scrap were consumed in the United States. The average price of the prime scrap grade, No. 1 Heavy Melting Steel, was $53.82 per gross ton. By 1960, only 23,567,000 gross tons of dealer scrap were consumed in the United States, and the price of No. 1 Heavy Melting Steel Scrap had dropped to an average of $32.82 per gross ton.

No. 1 Heavy Melting Steel Scrap constitutes 30% of all dealer scrap consumed and is sold in far greater quantity than any other scrap grade. Thus, the loss of revenue to the scrap industry from the sale of No. 1 Heavy Melting Steel Scrap alone in 1960, as compared to 1956, was $334,829,232.

Scrap is one of the most profitable commodities hauled by the railroads. For example, during the period of 1955 through 1959, an average of 16,015,700 net tons of scrap were shipped annually in Eastern Territory, yielding revenues to the railroads of $57,543,920 per year.

Following World War II, the railroads of the United States imposed a series of rate increases on scrap amounting to 142.2% by 1958. During the same period, iron ore rates were increased only 68.8%. The eastern railroads, defendants before the Interstate Commerce Commission, admitted that iron ore had received favored treatment in general rate increase cases, that iron ore rates were very low, and that the combined percentage increases of iron ore rates were less than on any other commodity.

The effect of high scrap rates and subnormal iron ore rates was that steel producers, as a substitute for scrap, consumed an increased percentage of pig iron and hot metal smelted from iron ore. Thus, in 1960, scrap prices fell below their 1947 average, and consumption ebbed to 1941 levels.

In addition, the import of iron ore from foreign mines, owned or controlled by the domestic integrated steel mills, moving inland by rail on subnormal rates, mushroomed in 1959, while scrap processers were unable to ship to historic markets because of the barrier created by freight rates.

In 1958, the scrap industry appealed for relief to the railroads, and in every territory throughout the United States, excepting Eastern Territory, namely, Southern, Southwestern, Western Trunk Line, Illinois Freight Association and Mountain-Pacific, rate adjustments were made.

However, the Eastern Territory railroads adamantly refused to grant relief, and on August 15, 1960, appellants filed their complaint with the Interstate Commerce Commission against the forty-nine Class I Eastern Territory Railroads[1] attacking scrap rates in Eastern Territory as being unreasonable in violation of Section 1(4) and (5) of the Interstate Commerce Act, and prejudicial to scrap and

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[1] Akron, Canton & Youngstown R. R.
Ann Arbor R. R.
Baltimore & Ohio R. R.
Bangor & Aroostook R. R.
Bessemer & Lake Erie R. R.
Boston & Maine R. R.
Canadian Pacific Lines in Maine
Central R. R. Co. of New Jersey, The
Central Vermont Ry., Inc.
Chesapeake & Ohio Ry.
Chicago & Eastern Illinois R. R.
Chicago & Illinois Midland Ry.
Chicago, Milwaukee, St. Paul & Pacific R. R.
Delaware & Hudson R. R.
Delaware, Lackawanna & Western R. R.
Detroit & Toledo Shore Line R. R.
Detroit, Toledo & Ironton R. R.
Elgin, Joliet & Eastern Ry.
Erie R. R.
Grand Trunk Western R. R.
Green Bay & Western R. R.
Illinois Central R. R.
Illinois Terminal R. R.
Lehigh & Hudson River Ry.
Lehigh & New England R. R.
Lehigh Valley R. R.
Long Island R. R.
Maine Central R. R.
Missouri-Illinois R. R.
Monon R. R.
Monongahela Ry.
New York Central R. R.
New York, Chicago & St. Louis R. R.
New York Connecting R. R.
New York, New Haven & Hartford R. R.
New York, Susquehanna & Western R. R.
Norfolk & Western Ry.
Pennsylvania R. R.
Pennsylvania-Reading Seashore Lines
Pittsburgh & Lake Erie R. R.
Pittsburgh & West Virginia Ry.
Reading Company
Richmond, Fredericksburg & Potomac R. R.
Rutland Ry. Corp.
Staten Island Rapid Transit Ry.
Toledo, Peoria and Western R. R.
Virginian Ry.
Wabash R. R.
Western Maryland Ry.

preferential to iron ore, in violation of Section 3(1) of the Interstate Commerce Act.

As relief, the complaint sought a revision of scrap rates as follows:

1. That the prevailing 80,000 pound scrap rates be no more than 70% of the prevailing 80,000 pound rates on manufactured iron and steel articles;

2. That the heavier loading characteristics of scrap be acknowledged by the establishment of a new scale of rates at 100,000 pounds to be 50% of the prevailing 80,000 pound manufactured iron and steel rates;

3. That scrap rates be no more than 150% of the prevailing iron ore rates; and

4. That scrap rates be no more than 70% of the prevailing pig iron rates.

Eleven integrated steel mills[2] intervened to protect the subnormal iron ore rates. (Integrated steel mills have facilities for smelting iron ore into hot metal or pig iron, as contrasted with nonintegrated steel mills and foundries which have no such facilities, but depend entirely upon pig iron and/or scrap for remelting purposes.) Two nonintegrated steel mills intervened in support of the complaint.[3] The intervening integrated steel mills made no attempt to justify the present scrap rates, and in some instances, admitted in direct testimony that scrap rates were too high.

Pursuant to special rules of procedure, direct testimony was submitted in the form of written verified statements. Oral cross-examination of the appellants' witnesses was waived by the railroads and the interveners. The two

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[2] United States Steel Corp., Inland Steel Corp., Bethlehem Steel Co., Pittsburgh Steel Co., Youngstown Sheet & Tube Co., Jones & Laughlin Steel Corp., Weirton Steel Co., Division of National Steel Corp., Republic Steel Corp., Wheeling Steel Corp., Armco Steel Corp. and Laclede Steel Co.

[3] Green River Steel Corporation and Northwestern Steel and Wire Company.

witnesses appearing on behalf of the defendant railroads were cross-examined in full.

But when the witnesses appearing voluntarily on behalf of the intervening integrated steel mills were cross-examined on the specific data and practices of their mill pertaining to scrap, iron ore and traffic conditions, they refused to answer the questions, pleading confidential information. (One witness actually withdrew his verified statement rather than submit to cross-examination.) The hearing examiner upheld the right of the witnesses to plead confidential information, and denied appellants the right to question the interveners' witnesses concerning facts, figures and statistics of their individual mills.

On August 29, 1961, following the oral hearing and submission of briefs, the examiner issued his report and order recommending that the complaint be dismissed. His report and order contained forty errors, all of which were enumerated in exceptions filed by the appellants with the Commission on October 9, 1961.

The Interstate Commerce Commission adopted the recommended report and order in its decision of April 2, 1962, 316 I.C.C. 55, and repeated the examiner's errors. It held that scrap rates were not unreasonable and that there was no justification for relating scrap rates to rates on manufactured iron and steel, pig iron, or iron ore, a finding directly contrary to the Commission's decision in *Newport News Shipbuilding & Drydock Co.* v. *B. & O. R. Co.*, 160 I.C.C. 620, to which further reference will be made.

However, in the appeal proceedings in the United States District Court, the Commission admitted that several errors had been committed, but alleged they were typographical.

Appellants' complaint to the District Court was dismissed. The summary *Per Curiam* decision failed to rectify the errors admitted by the Commission, and upheld

the hearing examiner's ruling that the voluntary steel mill witnesses could plead confidential information in refusing to answer questions on cross-examination.

## THE QUESTIONS ARE SUBSTANTIAL

This appeal presents important issues of substance and procedure. Of great substantive importance to the scrap industry is the uncertainty in the scrap rate structure created by the District Court and the Interstate Commerce Commission in disregarding the prescription for establishing scrap rates and awarding reperations, previously followed by the Commission for thirty-four years in more than forty cases. Of procedural importance to the administration of the Interstate Commerce Commission and interpretation of the Administrative Procedure Act is the precedent approved by the District Court of permitting volunteer witnesses to plead confidential information to prevent their being cross-examined in an administrative proceeding.

## ARGUMENT

### 1. The Scrap Rate Structure Becomes Chaotic by the Abrogation of the Newport News Formula

On December 31, 1929 the Interstate Commerce Commission, in *Newport News Shipbuilding and Drydock Co. v. B. & O. R. Co.*, 160 I.C.C. 620, announced a prescription for scrap rates:

> "In 17,000, Part 6, *Iron and Steel Articles*, 155 I.C.C. 517, decided June 7, 1929, a distance scale of rates was prescribed for the future on iron and steel articles in Official Territory. On this record we are convinced that rates made 70% of those prescribed in Appendix F of that case affords a fair basis upon which to construct rates on scrap for the future from and to the points here considered."

> "We further find . . . the (scrap) rates assailed are and for the future will be unreasonable to the extent that they exceed or may exceed rates per ton of 2,240 pounds made on the basis of 70% of the basic scale of rates prescribed in *Iron and Steel Articles, supra*, as set forth in Appendix F thereto, applied in the manner therein indicated."

The 70-percent formula of the *Newport News* case, *supra*, was a direct outgrowth of a 1927 decision in which the Commission found a chaotic scrap rate structure:

> "Complainants' comparisons, considered alone, indicate that the rate charged was excessive, while defendants' comparisons, considered in the same way, establish the reasonableness of the rate assailed. As a whole the record definitely establishes little except the lack of a recognized rate level on scrap iron in this territory and the resultant possibility of selecting rates tending to overthrow or support other rates in comparison, according to the purpose sought." *West Virginia Rail Co.* v. *B. & O. R.R. Co.*, 136 I.C.C. 303 (1927).

For the past thirty-four years the Commission has adhered to the 70-percent rule despite more than forty cases brought by the railroads in a futile attempt to destroy the doctrine. For example, in 1952, the Commission stated:

> "In over forty proceedings the 70-percent basis has been prescribed by this Commission for application on scrap between points in Official Territory. They embrace a period of more than twenty years, beginning with *Newport News Shipbuilding and Drydock Co.* v. *B. & O. R. Co.*, 160 I.C.C. 620, decided in December 31, 1929. Since then that basis has been prescribed for application on scrap between numerous points in Official Territory in decisions many of which are cited in *Midvale Co.* v. *Wheeling & L. E. Ry. Co.*,

231 I.C.C. 734, 736. In the earlier proceedings reparation generally was not awarded to the 70-percent basis. However, on reconsideration in *Midvale Co.* v. *Wheeling & L. E. Ry. Co., supra*, decided on March 7, 1939, the Commission said, at page 737:

" 'In most of the other proceedings referred to above, reparation was awarded only to the basis of the sixth-class rates, but when we have so clearly indicated that in our opinion rates in excess of the 70-percent basis in Official Territory are unreasonable, carriers should not be permitted to refuse to adjust their rates to that basis until they are ordered to do so, and then escape payment of reparation when a complaint is filed.'

"Thereafter, reparation was awarded to the 70-percent basis in numerous proceedings." *Newport News Shipbuilding and Drydock Company* v. *Chesapeake & Ohio Railroad Co.*, 284 I.C.C. 409 (1952).[4]

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[4] The following is a partial list of the cases in which the 70-percent basis has been upheld: *Continental Steel Corp.* v. *Akron, C. & Y. Ry. Co.*, 168 I.C.C. 371 (1930); *Friedman Co.* v. *C. & O. Ry. Co.*, 174 I.C.C. 273 (1931); *Abrahams & Co.* v. *Chesapeake & O. Ry. Co.*, 177 I.C.C. 525 (1931); *Klotz Bros.* v. *Chesapeake & O. Ry. Co.*, 177 I.C.C. 557 (1931); *Mansback Scrap Iron Co.* v. *Chesapeake & O. Ry. Co.*, 178 I.C.C. 234 (1931); *American Scrap Material Co.* v. *Atlantic & Y. Ry. Co.*, 191 I.C.C. 45 (1933); *Scrap Iron from Lynchburg, Va. to Pittsburgh, Pa.*, 194 I.C.C. 200 (1933); *Caplan* v. *Pennsylvania R. Co.*, 200 I.C.C. 530 (1934); *Hausman & Wimmer* v. *Ann Arbor R. Co.*, 208 I.C.C. 438 (1935); *Joseph Schonthal Co.* v. *Central R. Co. of New Jersey*, 208 I.C.C. 543 (1935); *Ingersoll Steel & Disc Co.* v. *Pennsylvania R. Co.*, 209 I.C.C. 109 (1935); *Scrap Iron from Shelby, Ohio to Pittsburgh*, 209 I.C.C. 145 (1935); *I. Berman & Son* v. *Chesapeake & O. Ry. Co.*, 210 I.C.C. 356 (1935); *Summer & Co.* v. *Pennsylvania R. Co.*, 225 I.C.C. 513 (1937); *Midvale Co.* v. *Wheeling & L. E. Ry. Co.*, 231 I.C.C. 734 (1939); *Traffic Bureau, Lynchburg C. of C.* v. *B. & O. R. Co.*, 235 I.C.C. 139 (1939); *Platnick Bros., Inc.* v. *B. & O. R. Co.*, 238 I.C.C. 218 (1940); *Traffic Bureau, Lynchburg C. of C.* v. *Aberdeen & R.R. Co.*, 245 I.C.C. 49 (1941); *L. Berman & Son* v. *C. & O. R. Co.*, 246 I.C.C. 101 (1941); *Kasle Iron & Metal Co.* v. *Wheeling & L. E. R. Co.*, 251 I.C.C. 544 (1942); *Summer & Co.* v. *Erie R. Co.*, 255 I.C.C. 475 (1943); *M. Glosser & Sons* v. *Pennsylvania R. Co.*, 256 I.C.C. 579 (1943); *National Forge & Ordnance Co.* v. *Pennsylvania R. Co.*, 256 I.C.C. 744 (1944); *M. N. Landay Co.* v. *Pennsylvania R. Co.*, 258 I.C.C. 287 (1944); *Coeburn Produce Co.* v. *N. & W. R. Co.*, 258 I.C.C. 529 (1944); *Vulcan Mold & Iron Co.* v. *B. & O. R. Co.*, 259 I.C.C. 138 (1944); *National Radiator Co.* v. *Long Island R. Co.*, 259 I.C.C. 143 (1944); *Summer & Co.* v. *N. Y. C. R. Co.*, 262 I.C.C. 43 (1945); *Vulcan Mold & Iron Co.* v. *B & O. R. Co.*, 262 I.C.C. 384 (1945); *Summer & Co.* v. *Erie R. Co*, 262 I.C.C. 377 (1945); *Empire Steel Corp.* v. *Pennsylvania R. Co.*, 263 I.C.C. 664 (1945); *American Steel Abrasives Co.* v. *Ann*

In 1929, manufactured iron and steel moved on 40,000 pound rates and scrap on 44,800 pound rates. Subsequently, alternating 80,000 pound rate scales were established on both commodities, and since 1954, when the 80,000 pound scrap rates became effective, virtually all scrap has moved on the higher minimum.

However, the 70-percent rule of the *Newport News* case, *supra*, applies only to the 44,800 pound scrap rates. Thus, part of the relief sought in the instant case was the extension of the *Newport News* formula to the 80,000 pound scrap rates.

The underlying rationale of the 70-percent basis was expressed in *Coeburn Produce Co.* v. *N. & W. R. Co.*, 258 I.C.C. 529 (1944):

> "We know that scrap iron is a low-grade commodity, requires no special treatment for its rail transportation, nor expedited service, loads heavily — as illustrated by the average load of the shipments in question, 76,133 pounds, which was 31,333 pounds above the applicable minimum carload weight of 44,800 pounds and, since it is hardly subject to damage in transit, involves little or no risk to the carriers in its movement."

This Court has endorsed the rate making principle that rates on raw materials should be lower than those established on the manufactured products:

> "A lower rate properly may be applied to a product when in an unfinished condition than that applicable

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*Arbor R. Co.*, 269 I.C.C. 607 (1948); *Hockensmith Corp.* v. *Delaware & H. R. Corp.*, 270 I.C.C. 504 (1948); *Empire Steel Corp.* v. *B. & O. R. Co.*, 272 I.C.C. 669 (1948); *Empire Steel Corp.* v. *B. & O. R. Co.*, 272 I.C.C. 594 (1948); *Empire Steel Corp.* v. *B. & O. R. Co.*, 281 I.C.C. 512 (1941); *Newport News Shipbuilding and Drydock Co.* v. *C. & O. R. Co.*, 284 I.C.C. 409 (1952); *Dayton Steel Foundry* v. *B. & O. R. Co.*, 288 I.C.C. 751 (1953); *Ashland Malleable Iron Co.* v. *C. & O. R. Co.*, 289 I.C.C. 191 (1953); *Farrell Check Steel Co.* v. *N. Y. C. R. Co.*, 292 I.C.C. 288 (1954); *Jessop Steel Co.* v. *Pennsylvania R. Co.*, 296 I.C.C. 339 (1955); *Continental Foundry & Machine Co.* v. *B. & O. R. Co.*, 296 I.C.C. 418 (1955).

> to it when finished. In *National Refining Company* v. *M. K. & T. Ry.* (1912) 23 I.C.C. 527, it was held that rates applicable to refined oil were excessive when applied to carload shipments of the so-called lighter ends of petroleum which had been separated from crude oil by a skimming process, — that is, by distillation sufficient to take off the more highly volatile elements, — but which was useless for commercial purposes until a further process of refinement had been undergone." *United States* v. *Gulf Refining Company*, 268 U.S. 542 (1925).

In dismissing the appellants' complaint in the instant case, the Commission found: "Moreover, there is no justification from a transportation standpoint for requiring a rigid relationship between the rates on scrap and the rates on any of these other (manufactured iron and steel, pig iron and iron ore) commodities." 316 I.C.C. at page 67.

If scrap rates are not to be related to rates on manufactured iron and steel, pig iron and iron ore, what then is to be the measuring gauge? Thirty-four years ago the Commission commented in the *Newport News* case, *supra*:

> "The present adjustment of rates on scrap in official territory is so replete with inconsistencies that it is possible by judicious selection of comparative rates to support almost any conclusion which may be desired. This chaotic condition was commented upon in *West Virginia Rail Co.* v. *B. & O. R.R. Co.*, 136 I.C.C. 303, 306. Apparently distance has not entered to any great extent into the establishment of these rates, and the situation is further confused by the fact that the majority of them apply to groups of undisclosed extent, thus making difficult any intelligent comparison on a distance basis."

The decisions of the District Court and the Interstate Commerce Commission in this case revert the scrap rate structure to the confused and disorderly condition that

existed during the 1927-1929 era. Their decisions are contrary to the time-tested 70-percent prescription which the railroads' chief witness in the proceedings before the Commission admitted was a reasonable maximum level for scrap rates and would be granted to shippers applying by postcard. (Cross-examination, E. W. Himmert, pages 54 and 70).

## 2. Confidential Information is an Improper Shield for Cross-examination.

Appellants' complaint before the Interstate Commerce Commission did not attack the iron ore rate structure. However, part of the relief sought was to reduce scrap rates to a level of 150% of the iron ore rates. Scrap iron rates are presently 300% to 400% of the iron ore rates. This economic travesty is fostered by joint cooperation in rate-making of the eleven integrated steel mills and the Eastern railroads, defendants below.

Reduced scrap rates would minimize the preference enjoyed by the integrated steel mills in receiving their raw material (iron ore) at subnormal rates while nonintegrated steel mills were receiving their raw material (scrap) at excessive rates.

The integrated steel mills dominated the defense before the Commission with seven witnesses while only two witnesses appeared for the forty-nine defendant railroads.

The context of the testimony of the seven steel mill witnesses was two-fold: (1) general statistics taken from the entire steel industry throughout the United States, and (2) references to specific data, procedures, melt practices, and traffic movements of the steel mills represented by the witnesses.

Appellants objected to the introduction into evidence of generalized statistics as being irrelevant and immaterial as to conditions on scrap in Eastern Territory. Appellants

proved that the movement and consumption of scrap outside Eastern Territory had been stimulated by freight rate reductions and that the use of generalized statistics as probative evidence of scrap conditions within Eastern Territory presented an unfair, distorted picture.

However, the hearing examiner overruled the objections. When appellants attempted to cross-examine the steel mill witnesses on individual statistics, data and transportation conditions relating to scrap in each witness's mill in order to challenge the impression that conditions prevailing outside Eastern Territory were the same as those within Eastern Territory, the hearing examiner refused to permit the questions, ruling that the witnesses could plead confidential information (Cross Examination of John C. Howard, Tr. p. 243.)

The Commission then chose to reject the concrete testimony of the appellants' 16 witnesses as to conditions on scrap within Eastern Territory, and based its ultimate findings on the generalized steel mill statistics which had been admitted into evidence unchallenged by cross-examination.

Appellants submit that the action of the hearing examiner and the Commission violated the rudimentary precepts of judicature, and confiscated the appellants' constitutional rights to due process of law.

The District Court avoided the issue of whether a witness being cross-examined could refuse to answer questions on the ground that the questions sought confidential information. The court gave two untenable reasons for upholding the Commission: (1) that the appellants did not recall the witnesses on direct examination and make proffers, and (2) that cross-examination could not have produced testimony inconsistent with the Commission's findings.

As to the first reason that the appellants did not recall the witnesses on direct examination and make proffers, if

the questions were improper under the liberal rules of cross-examination, *a fortiori* they would be more improper under the restrictive rules of direct examination. At best, proffers would have been generalized, since obviously the appellants had no access to the statistics and data of the individual mills. Aside from this point, the appellants were entitled as a matter of right to interrogate the hostile witnesses on cross-examination rather than be put to the disadvantage of presenting their case through unpersuasive proffers.

As to the second reason that the cross-examination could not have produced testimony inconsistent with the Commission's findings, how could the court presume to know the substance of the testimony when the door of inquiry was closed to the appellants?

The District Court's ruling was directly contrary to law and it denied due process of law. The rules governing cross-examination in complaint proceedings before the Interstate Commerce Commission are definitively set forth in the Administrative Procedure Act and the General Rules of Practice of the Interstate Commerce Commission. Section 7(c) of the Administrative Procedure Act, 5 United States Code, Section 1006 (c) provides:

> "Every party shall have the right . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Rule 1.75 of the General Rules of Practice of the Interstate Commerce Commission states that "the rules in evidence governing proceedings in matters not involving trial by jury in the courts of the United States" shall govern, and Rule 1.77 guarantees "the right of cross-examination of the witnesses." (Rules 1.75 and 1.77 are set forth in full in Appendix E attached hereto.)

The District Court's ruling establishes a precedent disregarding the Constitutional rights guaranteed to litigants

by this Court in administrative proceedings. Justice Cardoza stated in *Ohio Bell Tel. Co.* v. *Public Commission of Ohio*, 301 U.S. 292:

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. *West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 1), *supra*, p. 70; *West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 2) 294 U.S. 79; *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U.S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (*St. Joseph Stockyards Co.* v. *United States*, 298 U.S. 38, 73) of a fair and open hearing be maintained in its integrity. *Morgan* v. *United States*, 298 U.S. 468, 480, 481; *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, *supra*. The right to such a hearing is one of 'the rudiments of fair play' (*Chicago M. & St. P. Ry. Co.* v. *Polt*, 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 1), (No. 2), *supra*; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 682. *Cf. Norwegian Nitrogen Co.* v. *United States*, *supra*. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

### 3. The Commission's Errors Were Material

In the proceedings before the Interstate Commerce Commission, appellants filed exceptions enumerating forty

errors in the report of the hearing examiner. Most of these errors were repeated by the Commission in its decision of April 2, 1962 and these errors became the basis for appellants' complaint in the District Court. In their answers filed in the District Court, the defendant, Interstate Commerce Commission, and the intervening defendant railroads admitted that the Commission's decision did in fact contain several errors which they alleged were typographical. The following are two examples of major errors:

A. The first full paragraph of page 60 of the Commission's report states: "In 1929, new steel sold for about $50.00 per ton and scrap a third less". (Scrap sold for two-thirds less.) "Today, the premium grade of scrap sells for under $90.00 per gross ton while new steel generally averages between $120.00 and $150.00". (The premium grade of scrap sells for under $30.00 per gross ton and not $90.00.) If scrap selling at $90.00 per ton (as the Commission erroneously believed) suffered no market disadvantage, can it be denied that scrap selling at $30.00 per ton was at a severe disadvantage? Related in terms of percentages using the Bureau of Labor Statistics price index for July, 1960, based on the 1947-1949 averages equalling 100, scrap was 88 or down 12%, iron ore was 169.7 or up 69.7% and pig iron was 162.5 or up 62.5%.

B. Page 67 of the Commission's decision states in the second full paragraph: "As noted, the transportation characteristics of iron ore, pig iron, manufactured iron and steel, and scrap differ widely". The principal witness for the interveners, John C. Howard, Traffic Manager of Bethlehem Steel Corporation, testified on page 168 of the transcript: "Transportation conditions, I would say, are in no material way altered since 1929. Transportation of scrap is still handled in the same type of equipment, moves generally from most any origin in Official Territory to a limited number of destinations. I think it is much the same".

In addition, all the appellants' witnesses testified that transportation conditions involving scrap, as compared to iron ore and pig iron, were the same. How could the Commission arrive at a different conclusion when the opposing parties agreed on the transportation conditions? How could the Commission abandon the *Newport News* formula when the record was uncontroverted?

Moreover, the repetition by the Commission of what it later admitted were the hearing examiner's errors after their having been cited in appellants' exceptions, was indicative of the slipshod manner in which the Commission conducted the proceedings[5] and points to the conclusion that the appellants were denied a fair hearing because of the failure of the hearing examiner and the Commission to judiciously review the record. These admitted errors stand preserved as findings of fact in the Commission's official report of the case and unless corrected will be repeatedly cited as precedent in future proceedings because of the magnitude of this case.

## CONCLUSION

This case brought by 361 appellants constituting the major shippers of scrap in Eastern Territory, seeks to obtain justice in rate making as was intended by Congress when it passed the Interstate Commerce Act. The judicial trail that shippers must follow is a narrow one fraught with procedural difficulties. By law a shipper may only attack a rate in the Interstate Commerce Commission where the responsibility of judicious review is delegated to a hearing examiner who in many cases has neither a conversant knowledge of the industry involved nor the freight rate structure applicable to that industry. However quasi-

[5] In the District Court proceeding, the Commission committed errors which the District Court found necessary to correct on its own motion in order to avoid "the entering of a final order for the plaintiffs (appellants) as a matter of law."

judicial may be the atmosphere in which the proceedings are conducted, it requires no stretch of the imagination to appreciate that primary education begins for appellants in orienting the examiner.

The railroads and intervening steel mills have acquired a sophisticated approach to handling matters before the Interstate Commerce Commission. There is close cooperation between the eastern railroads and the eastern steel mills. The uncontroverted testimony before the hearing examiner concedes that the steel mills recommend the rates for iron ore, pig iron, new steel and scrap and the railroads adopt the rates with neither investigation nor approval by shippers other than the steel mills themselves.

The shippers in the instant case could not initiate their complaint in the courts for redress of their grievance or to halt an obvious injustice. They were compelled to follow the strict Commission procedure of appealing from the hearing examiner to the Commission which in turn rubberstamped the examiner's report including the errors subsequently admitted. It is doubtful whether the Commission ever read the examiner's report, the appellants' exceptions, or the pleadings and briefs; otherwise how could the errors listed in the exceptions have gone unnoticed and uncorrected?

Due process of law must be zealously preserved in administrative proceedings. Arguing at a later date that it made no difference whether the right of cross-examination existed is hardly consonant with modern concepts of justice and fair play. The right to cross-examination is a right that exists at the time of trial and it cannot come in an adulterated form or by some kind of condensed package of presumption and inference. A trial before a hearing examiner is no less a trial than it is before a Federal judge or a Federal judge and jury. Due process of law cannot be circumvented by the restrictions imposed by a quasi-judicial

officer whose findings are sympathetically reviewed by his own superiors.

Appellants submit that had the steel mill witnesses been cross-examined on the facts, figures and statistics involving their individual mills, there would have been a wealth of testimony supporting the unreasonableness of the scrap rates, the discrimination being visited upon the scrap dealers and the unfair and prejudicial advantages being afforded to shippers of iron ore and pig iron. If the hearing examiner elected to shroud the true facts and figures from being exposed he mistakenly applied the theory of the Fifth Amendment in a civil proceeding involving voluntary witnesses appearing for interveners.

If the Congress in its wisdom granted to the Interstate Commerce Commission the rate-making review, power and authority, it also conveyed to the appellants the fundamental privileges and rights that any litigant has in the Federal Courts. Vast injury has been committed by reason of the compounded errors of the hearing examiner, the Interstate Commerce Commission and the District Court. An entire industry in fifteen states constituting approximately 75% of the nation's scrap iron shippers is in the course of being destroyed by the continuation of rate abuses sanctioned by the Court below and the Commission.

The eastern railroads are content to charge what the traffic will bear. The eleven intervening steel mills are only concerned with protecting existing rates on iron ore and pig iron. The appellants are fighting for their economic lives and they should have been granted relief or at least have been afforded an opportunity to present all of the facts and figures supporting their contentions.

Plenary review is sought herein by the appellants because the record of the case cries out for a different result than the affirmation of freight rates for scrap being three or four times that of iron ore. It is inconceivable that the

Commission and the three-judge District Court could have arrived at a conclusion that scrap rates should be higher for a waste commodity than rates on pig iron manufactured by steel mills.

If the eleven intervener steel mills wished to safeguard the sanctity and secrecy of the facts and figures surrounding their scrap shipments, they could have remained out of the case and not intervened. Once having voluntarily entered the case without reservation, they became subject to the same fundamental rules of trial procedure as did the appellants and defendant railroads.

If this case is not reversed, an industry employing several hundred thousand union laborers involving an investment of more than one-half billion dollars is threatened with extinction by a combination of railroads maintaining excessive scrap rates and integrated steel mills supporting these rates, which they are absolved from paying by reason of their utilization of iron ore moving on subnormal rates. The remainder of the nonintegrated steel mills and foundry industries together with the shippers of scrap become subordinated or extinguished by reason of an incomplete record.

We submit, therefore, that important questions are presented by this appeal involving matters of extreme public interest.

Respectfully submitted,

HOWARD GOULD

.....

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1104 Carew Tower
Cincinnati 2, Ohio
Attorneys for Appellants

September 27, 1963

## APPENDIX A

(CAPTION OMITTED)

### OPINION

(Entered May 8, 1963.)

Before: WEICK, Circuit Judge, PECK, District Judge, and DRUFFEL, Senior District Judge.

PER CURIAM. In this action, presented to a three-judge court pursuant to the provisions of Title 28, U.S.C., Sections 1336, 1398, 2284 and 2321-25, plaintiffs seek an order setting aside and enjoining an order of the Interstate Commerce Commission. The case was submitted to the Court on the record of the proceedings before the Commission including the testimony and exhibits and on oral arguments of counsel and briefs. It is conceded by all parties that the case is properly before this Court and that no jurisdictional problem exists.

The order here complained of was entered by the Interstate Commerce Commission (hereinafter referred to as the Commission) under its docket No. 33535, *Institute of Scrap Iron and Steel, Inc., et al.* v. *Akron, Canton and Youngstown Railroad Co., et al.*, 316 I.C.C. 55. Therein the Commission held the present rail rates on scrap iron and steel between points in Official Rate Territory not to be unjust and unreasonable and as not resulting in undue preference or prejudice in violation of applicable law. (49 U.S.C. § 1 (5); 49 U.S.C. § 3 (1) ).

Upon the record before us it has been concluded that the Commission's conclusions that the assailed rates had not been shown to be unjust, unreasonable or otherwise unlawful are based upon adequate findings supported by substantial evidence, and that they are neither arbitrary

nor unreasonable, and that there is a rational basis for the Commission's said conclusions.

Counsel for the parties have expended a substantial amount of time and energy debating whether or not a "typographical error" appeared in the Answers of the defendants and intervening defendants. This resulted from the appearance therein of the word "admit" in a context where its literal reading would require the entering of a final order for the plaintiffs as a matter of law. Defendants have steadfastly maintained that the word intended to be used was "deny," but for reasons best known to themselves they have never sought leave to amend by substituting the latter word for the former. However, such literal reading would be entirely inconsistent with the positions adopted by all parties throughout these proceedings, and a setting aside of the Commission's order on this highly technical ground would be both unrealistic and manifestly unjust. Accordingly, defendants and the intervening defendants are granted leave to amend their answers by interlineation by substituting the word "deny" for the word "admit."

Plaintiffs have complained at length that they were denied a fair hearing and due process of law by reason of the limitation placed on their cross-examination of certain witnesses by the Commission. However, a thorough review of the record in this case wherein the burden of showing impropriety in the Commission's conclusion is upon the plaintiffs, considered in the light of plaintiffs' arguments, does not bear this out. The plaintiffs did not see fit to recall the witnesses in question on direct examination as their own witnesses and make proffers. In any event, the areas of inquiry which were closed to plaintiffs by the restrictions complained of could not have produced evidence inconsistent with the Commission's determinations.

The other contentions and alleged errors enumerated by plaintiffs are not felt to here require individual discussion.

An order may be entered granting defendants leave to amend their answers by interlineation as hereinbefore provided and dismissing the Complaint.

/s/ PAUL C. WEICK
U. S. Circuit Judge
/s/ JOHN W. PECK
U. S. District Judge
/s/ JOHN H. DRUFFEL
Senior U. S. District Judge

## APPENDIX B

(CAPTION OMITTED)

**ORDER**

(Entered May 8, 1963.)

The above cause came on for hearing before the Court and was duly submitted for consideration and decision, and the Court having made and filed its opinion. Now, therefore, pursuant thereto, it is hereby

ORDERED AND ADJUDGED, that defendants' answers are amended by interlineation and the plaintiffs' complaint be and the same is hereby dismissed.

Dated at Cincinnati this 8 day of May, 1963.

/s/ PAUL C. WEICK
U. S. Circuit Judge
/s/ JOHN W. PECK
U. S. District Judge
/s/ JOHN H. DRUFFEL
Senior U. S. District Judge

## APPENDIX C

Section 1 (4) and (5) of the Interstate Commerce Act, 49 U.S.C. 1(4) and (5) provides:

**Duty to furnish transportation and establish through routes; division of joint rates**

(4) It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

**Just and reasonable charges**

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 3 (1) of the Interstate Commerce Act, 49 U.S.C. 3 (1) provides:

**Undue preferences or prejudices prohibited**

(1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

**Section 7 (c) of the Administrative Procedure Act, 5 U.S.C. 1006 (c) provides:**

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applica-

tions for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

## APPENDIX D

### LIST OF PLAINTIFF-APPELLANTS

B. Abrams & Sons, Inc.
Academy Iron & Metal Co.
Ace Iron & Metal Co.
Ace Steel Baling Inc.
Acme Scrap Iron & Metal Co.
Frank Adams & Co.
M. N. Adelson & Sons Inc.
Simon Adelson Co.
The Akron Scrap Iron Co.
Albert Bros.
I. Alderman & Sons Inc.
S. Allen & Son Inc.
Allied Iron & Steel Co.
Alma Iron & Metal Co.
Alpert Iron Co.
Alport Scrap & Salvage Co.
Amper Iron & Metal Co.
Annadale Scrap Co.
Arrow Steel & Supply Co., Inc.
Ashland Iron & Steel Co.
Ashland Scrap Materials Co.
Ashtabula Salvage Co.
Assad Iron & Metal Co.
Atlas Iron & Metal Corp.
Atlas Scrap Iron & Metal Co.
The Atlas Steel & Supply Co.
Attonito Co. Inc.

Babcock Iron & Metal Co.
Baker Iron & Metal Co.
Herman Banks Iron Yard
Barnett-Friedman Co.
The I. A. Barnett Co.
Sam A. Barnett Metal Co. Inc.
Beatrice Iron & Metal Co.
Joseph Behr & Sons
Joseph Behr & Sons, Inc.
Bengart-Memel & Co.
Bennie Cotton Inc.
Berg Bros. Co.
J. Berman & Sons Inc.
H. Bixon & Sons
N. Block & Co.
Blumberg & Nicholson
A. Blumberg & Son Inc.
L. Blumberg's Son, Inc.
Book Metals Corp.
A. Borinstein
The Boston Metals Co.

Brandywine Iron & Metal Co. Reg.
Bremen Iron & Metal Co.
A. Brenner & Co.
Briggs & Turivas Inc.
Brockton Iron & Steel Co.
Brodsky & Co.
Bronx Iron & Metals Corp.
Joe Brown & Sons
Buff & Buff, Inc.
Buffalo Sash Weight & Foundry Co., Inc.
The Buncher Co.
The Burstein Co.
The By-Product Iron & Steel Corp.

C. & R. Waste Materials Co. Inc.
Frank Calandra, Inc.
Harry L. Calig Co.
The Central Iron & Metal Co.
Central Iron & Metal Co.
Central Iron & Metal Co. Inc.
Chapin & Fagin Inc.
Charleroi Scrap Iron Co.
Chicago Metals Co.
Chillicothe Iron & Metal
City Scrap & Salvage Co.
Coatesville Scrap Iron & Metal Co. Inc.
Coeburn Produce Co.
Cohen Bros.
Cohen Bros. Inc.
Julian C. Cohen & Co. Inc.
Louis Cohen & Son
The M. Cohen & Son Co.
R. Cohen & Son
Cohn Bros. Inc.
Cometals, Inc.
Commercial Iron & Metal Co.
Consolidated Mill Supply Co.
A. Cooper Metal Co. Inc.
Cousins Iron & Metal Co.
The Joseph P. Crowley Co.

Daniels & Miller
Davis Iron & Metal, Inc.
The Deitch Co.
Delawanna Iron & Metal Co. Inc.
Detroit Scrap Metals Co.
Diamond Scrap Yards Inc.
Duberstein Iron & Metal Co. Inc.
Down River Scrap Iron & Metal Co.
Dumes Inc.
Dumes Salvage Co. Inc.
Duquesne Iron & Steel Co. Inc.

Eastern Scrap & Salvage Corp.
Eastern States Steel Products Corp.

A. Edelstein & Son
H. Eichelbaum & Co.
A. Eisner & Co.
Elkhart Metals Co.

Falender Iron & Metal Corp.
Fealk Scrap Iron Co.
Feldstein Iron & Metal Co.
Fell Iron & Metal Inc.
Ferrous Steel Corp.
Fisher Steel & Supply Co.
Arthur Fivenson Iron & Metal Co.
Flint Scrap Iron & Metal Co.
Louis Frank & Sons
Frankel Co. Inc.
Franklin Auto Parts
Franklin Iron & Metal Co. Inc.
David Freedman, Inc.
I. Friedman
William Frost Co. Inc.

Garbose Metal Co.
Samuel Garbowitz & Son Inc.
S. Gaudiano & Bros.
General Iron Industries
Genesee Scrap & Tin Baling Co. Inc.
Geneva Iron & Metal Co.
Giordano Waste Material Co. (Camden, N.J.)
Giordano Waste Material Co. (Trenton, N.J.)
Glazer Scrap Co.
Glick Iron & Metal Co.
Goldberg Iron & Steel Co.
T. M. Goldstan
H. Gordon, Inc.
L. Gordon Iron & Metal Co. Inc.
Samuel Gordon & Sons Inc.
Gordon Waste Co. Inc.
Graff Bros. Scrap Iron & Metal Co. Inc.
Reuben R. Graff Co.
Gratiot Metals Co.
P. J. Greco Sons, Inc.
Samuel Greenfield Co.
J. Grossman & Son Inc.
Grund, Inc.

H. D. Metal Co.
Handler Sons Compressed Steel Corp.
Hanover Junk Co.
Harcon Corp.
Benjamin Harris & Co.
Harris Fiestal & Son
The Louis G. Hehman Co.
Hendricks Sales Co.
G. I. Hertel
H. Hirschfield Sons Co.
Holub Iron & Steel Co.
Home City Iron & Metal Co.
Hopewell Iron & Steel Co.
Charles Horewitz Sons
Hudson Iron & Metal Co.

Imperial Smelting Corp.
Independent Iron & Metal Corp.
Independent Scrap Iron & Metal Corp.
Indiana Rolling Mill Baling Corp.
Industrial Salvage Corp.
Industrial Service & Salvage Corp.
Inland Metal Refining Co.
International Scrap Iron & Metal Co. Inc.
Inter-State Steel Co.
Iron & Metal Products Co.
Iroquois Steel & Iron Co.
Abraham Isaac & Sons Co.

Jackson Iron & Metal Co. Inc.
Jakob & Seligmann Inc.
Jones Iron & Metal Co.
Louis Joseph Co. Inc.

The Kaiser-Nelson Steel & Salvage Corp.
H. Kasden & Sons Inc.
Kasle Bros. Inc.
Kasle Steel Compressing Co.
The Kasle Iron & Metal Co.
D. Katz & Sons Inc.
Kent Salvage Co.
The Samuel G. Keywell Co. Inc.
Charles J. King Inc.
H. Klaff & Co. Inc.
The Klein Co.
Klotz Bros.
Kopelove Iron & Metal Co. Inc.
Kramer-Orloff Co.
Joe Krentzman & Son
The Joseph Kroot Co. Inc.
Wm. Kugler & Bro. Inc.
The Kulka Steel & Equipment Co.

Lafayette Compressed Steel Corp.
Lancaster Iron & Metal Co.
P. Lansky & Sons
Laro Coal & Iron Co.
L. Lavetan & Sons
Lebanon Iron & Metal Co.
The Lederer Iron & Steel Co.
E. Lenick & Co.
Lernor Iron & Metal Co. Inc.
Levin & Sons, Inc. and Ft. Wayne Scrap Baling & Steel Supply, Inc.
Max Levine & Co.
B. Levy Metals
Liberty Iron & Metal Co.
Liberty Scrap Metals, Inc.
Samuel J. Liftig Inc.
Linver-Kripke — Div. Wabash Scrap Material Co. Inc.

Livingston & Co.
The Luntz Iron & Steel Co.
Luria Bros. & Co. Inc.
Lynchburg Iron & Metal Co.

McCabe Scrap Iron & Materials Co.
McMahon Iron & Metal Co.
Magen Iron & Steel Co.
Magnetic Engineering & Mfg. Co.
H. R. Mandel Co. Inc.
Mansfield Steel & Supply Co.
Marco Iron & Supply Co.
Marshall Railway Equipment Corp.
A. W. Martin Inc.
Martin Bros. Mill & Foundry Supply Co.
Martinsville Scrap Iron & Metal Co.
Maryland Pipe & Metals Co.
Mason City Iron & Metal Co.
Mason Iron & Metal Co.
Matlow Corp.
The Mendlin Co.
Merchants Steel & Supply Co. Chicago Real Estate Board Bldg.
Mervis Iron & Metal Co.
Wm. Mervis & Sons
Metal Reclaiming Co.
Metropolitan Metals, Inc.
Michigan Scrap Co.
Mid City Scrap Iron & Salvage Co. Inc.
Midland Iron & Steel Corp.
Midvale Iron & Supply Co.
Miller Junk & Waste Co.
The Mindlin Co.
Minkin Salvage Co.
Monongahela Iron & Metal Co. Inc.
The Monumental Iron & Metal Co.
Morrisville Scrap Processing Co.
Moskowitz Bros.
Muskingum Iron & Metal Co.

Naproano Iron & Metal Co.
The National Iron & Metal Co.
B. L. Nickelson Iron & Metal Co. Inc.
Norfolk Iron & Metal Co.
North American Waste, Inc.
North Hudson Scrap Iron Corp.
Norwich Iron & Metal Co.
Nover, Morris Iron Co.

Otis-Oakley Iron & Supply Co.
Owosso Iron & Metal Co.
The Oxman Steel Corp.

Pear & Co. Inc.
Peck Iron & Metal Co. Inc.
Penn Iron & Metal Co.
Pennsylvania Wood & Iron Co. Inc.
Peoples Iron & Metal Co.
Pfister Auto Wreckers Inc.
Pielet Bros. Scrap Iron & Metal Inc.
Platnick Bros.
Jacob Plavin & Sons
D. Pollack & Sons Inc.
Mayer Pollack
Price Iron & Steel Co.
Public Iron & Metal Co. Inc.
The Purdy Co.

R & R Salvage Inc.
R & R Scrap Metal Co. Inc.
R & S Bailis Corp.
Sid Rancer Iron & Steel Co. Inc.
Myer Raphael & Sons, Inc.
Lewis Raphaelson & Son
Raw Materials Inc.
William Reisner Corp.
Republic Iron & Metal Co.
I. Richman & Co. Inc.
Riesberg's Iron & Metal Co.
Riverside Iron & Metal Co.
Riverside Iron & Steel Co.
Roanoke Scrap Iron & Metal Co. Inc.
Rochester Smelting & Refining Co. Inc.
Ross Auto Parts, Inc.
A. Rubenstein & Sons
Rubin Scrap Iron & Metal Co.

Salvage Agency
Sam's Iron & Metal Co., Inc.
Michael Schiavone & Sons, Inc.
Schiavone-Bonomo Corp.
Schlafer Iron & Steel Co.
E. Schneider & Sons
Schwartz
Samuel Schwartz Sons
The Scovill Iron & Metal Co.
Scrap Iron Baling Corp.
Seaboard Salvage Co.
Security Alloys Co.
H. Shakespeare & Sons
Shamokin Iron & Metal Co.
B. Shapiro & Co. Inc.
E. Slivken Co.
Silbey Iron & Metal Co.
Silverstein Iron & Metal Co.
Simon Iron & Steel Corp.
Sinow & Weinman
Sitkin's Junk Co. Inc.
Joseph Smith & Sons Inc.
Snyder Iron & Steel Co.
I. W. Solomon Co.
J. Solotken & Co. Inc.
Joseph Soutar Co.
South Bend Baling Co. Inc.
Southwest Steel Corp.
W. M. Spiegel Sons

Square Deal Junk Dealers Inc.
Staiman Brothers
Stainless Alloy Corp. of America
The State Metals & Steel Co. Inc.
M. J. Stavola & Co.
Steel City Iron & Metal Inc.
Joseph Stern Co.
Max Stern
Suisman & Blumenthal
William F. Sullivan & Co.
Summer & Co.
Superior Iron & Metal Co. Inc.
L. Surath & Sons
Swartz & Co.

Three Rivers Iron & Metal Co.
Morris Tick Co.
Trojan Scrap Iron Corp.
Troy Iron & Metal Co.
Tube City Iron & Metal Co.
The Twin City Iron & Metal Co.

United Iron & Metal Co.
United Iron & Metal Co. Inc.
Louis Usdin Co. Inc.

Valley Iron & Steel Co. Inc.
Hyman Viener & Sons

Wallace Steel & Supply Co.
Warren Iron & Metal Co.
Warren Scrap Iron & Metal Co.
Washington Iron & Metal Co. Inc.
Isaac Weiner, Inc.
M. Weingold & Co.
J. Weissman & Sons, Inc.
The Wellman Eng. Co.
West End Auto Wrecking
Chas. J. Whelden Co. Inc.
Wilkof Steel & Supply Co.
Wilmington Iron & Metal Co.
S. Wolkoff & Sons
Worley Steel & Supply Co.

M. A. Young & Co.
Ypsilanti Iron & Metal Co.

Zaslawsky Iron & Metal Co.
Zuckerman Co.

## APPENDIX E

Rule 1.75 of the General Rules of Practice of the Interstate Commerce Commission provides:

**Evidence; admissibility generally.** Any evidence which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, shall be admissible in hearings before the Commission. The rules of evidence shall be applied in any proceeding to the end that needful and proper evidence shall be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.

Rule 1.77 of the General Rules of Practice of the Interstate Commerce Commission provides:

**Evidence; prepared statements.** With the approval of the officer, a witness may read into the record, as his testimony, statements of fact or expression of his opinion prepared by him, or written answers to interrogatories of counsel, or a prepared statement of a witness who is present at the hearing may be received as an exhibit, provided that the statement shall not include argument; that before any such statement is read, or admitted in evidence the witness shall deliver to the officer, the reporter, and to opposing counsel as may be directed by the officer, a copy of such statement or of such interrogatories and his written answers thereto; and that the admissibility of the evidence contained in such statement shall be subject to the same rules as if such testimony were produced in the usual manner, including the right of cross-examination of the witness. Such approval ordinarily will be denied when in the opinion of the officer the memory or demeanor of the witness may be of importance.

LIBRARY SUPREME COURT, U. S.

No. 506

Office-Supreme Court, U.S.
FILED
OCT 21 1963
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1963.

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FRANK ADAMS & CO., ET AL.,
*Appellants,*

*vs.*

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
*Defendants,*

and

BALTIMORE & OHIO RAILROAD CO., ET AL.,
*Intervening Defendants.*

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On Appeal from the United States District Court
for the Southern District of Ohio,
Western Division

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## MOTION TO AFFIRM.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1963.

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## *No. 506*

---

FRANK ADAMS & CO., ET AL.,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

*Defendants,*

and

BALTIMORE & OHIO RAILROAD CO., ET AL.,

*Intervening Defendants.*

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On Appeal from the United States District Court
for the Southern District of Ohio,
Western Division

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## MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, The Baltimore & Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Grand Trunk Western Railroad; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Norfolk and Western Railway; The Pennsylvania Railroad Company; Pittsburgh & Lake Erie Railroad Company and Reading Company, defendants in

the proceedings before the Interstate Commerce Commission and intervenors-as-defendants in the Court proceeding below, move that the judgment of the District Court be affirmed.

## STATEMENT.

This is a direct appeal from the final judgment of a three-judge district court dismissing appellant's suit to set aside an order of the Interstate Commerce Commission (*Institute of Scrap Iron & Steel, Inc.* v. *Akron, C. & Y. R.*, 316 I.C.C. 55). In that proceeding, before the Commission, appellant alleged violations of Sections 1(4)(5) and 3(1) of the Interstate Commerce Act in the rail carrier defendants' maintenance of rates on scrap between points in official territory. The Commission dismissed the complaint on the ground that the assailed rates were not shown to be unjust, unreasonable, or otherwise unlawful. The Commission in its report made detailed findings of fact, based on the record, in support of its order of dismissal (316 I.C.C. 55, 66-67).

Appellant points out that rates on scrap have been the subject of Commission review in over forty proceedings up to 1952. Since that date at least four more cases have been decided by the Commission (J. S., pp. 10-13). The Commission pointed out in its report that the present basis of rates on scrap reflects some rates "much below the level reflecting 70 per cent of the iron and steel rates which had been prescribed as reasonable maximum" (313 I.C.C. 55, 57-58). The Commission in its report also found that its "prescription in specific cases from and to particular points did not affect all the rates on scrap iron within official territory as the commodity-rate structure which reflected origin and destination grouping provided many rates lower than the prescribed maximum" (313

I.C.C. 55, 57). Appellant admits that a lower basis of rates on scrap than that found reasonable in all of these cases before the Commission was sought by it in the present litigation (J. S. p. 7).

Appellant states that it has secured voluntary revisions in rates on scrap in territories other than those served by these intervening defendants (J. S. p. 6). The Commission pointed out in its report denying appellant relief that the southwestern and southern rates which apparently are satisfactory to appellant are "considerably in excess of the average level on scrap here assailed" (316 I.C.C. 55, 67).

The Court below found that "the Commission's conclusions that the assailed rates had not been shown to be unjust, unreasonable or otherwise unlawful are based upon adequate findings supported by substantial evidence, and that they are neither arbitrary nor unreasonable and that there is a rational basis for the Commission's said conclusions" (J. S. pp. 23-24).

## ARGUMENT.

**This appeal presents no substantial question warranting plenary consideration by this Court.**

Appellant asserts that the scrap rate structure has become chaotic by the "abrogation" of the Newport News formula (Question 1). What the Commission did was to refuse to disregard the record and years of precedent and prescribe rates lower in level than those previously found lawful. Orders of the Commission should not be set aside, modified or disturbed by a court on review if they be within the scope of the Commission's statutory authority and are based upon adequate findings even though the court might reach a different conclusion on the facts presented. *United States* v. *Pierce Auto-Freight Lines,* 327 U.S. 515, 535-536.

Appellant urges that scrap is in an unfinished condition and thus should take lower rates than steel, a finished article, and cites in support thereof *United States* v. *Gulf Refining Company,* 268 U.S. 542. It should be noted that the Court there stated that "a lower rate properly *may* be applied to a product when in an unfinished condition than that applicable to it when finished." (Emphasis supplied). The rule applicable to the facts here presented is stated in *Mid States Steel & Wire Co.* v. *Baltimore & O. R. Co.,* 296 I.C.C. 278, 280, where the Commission found that rates on raw materials are not necessarily unreasonable simply because they are higher than the rates on the finished product where the rate on the finished product is depressed in order to meet competitive conditions. The Commission in its report here found that "truck competition on manufactured iron and

steel articles is much more severe than on scrap, and is effective at substantially all distances whereas motor transportation of scrap is concentrated largely in the shorter hauls, principally to assembly yards" (316 I.C.C. 55, 64).

Appellant finally states that "if scrap rates are not to be related to rates on manufactured iron and steel, pig iron and iron ore, what then is to be the measuring gauge" (J. S., p. 13). The Commission found that "the transportation characteristics of iron ore, pig iron, manufactured iron and steel, and scrap differ widely" (316 I.C.C. 55, 67). Appellant had the burden of proof before the Commission. The Commission in its expertise found squarely on the facts against appellant.

Appellant finally urges that it was deprived of a fair hearing since it was denied the right of cross-examination (Questions 2-3). Appellant first objects to the Commission's reliance upon so-called generalized statistics. In this connection, it should be pointed out that the Commission is the trier of facts. *Transamerican Freight Lines, Inc.* v. *United States,* 51 F. Supp. 405 (1943). While it is true that the Commission's findings must be supported by the evidence before it, it is the Commission's function, and not the court's, to weigh that evidence and the Commission's findings of fact must be sustained if supported by any substantial evidence. *National Auto. Transporters Assn.* v. *United States,* 121 F. Supp. 289 (1954); *U. S.* v. *Pan American Corp.,* 304 U.S. 156 (1938); *Alton Railroad Company* v. *United States,* 315 U.S. 15, 23 (1942); *United States* v. *Pierce Auto-Freight Lines,* 327 U.S. 515 (1946). The Commission is the expert body designated by Congress to determine such technical and complicated questions of fact. *Board of Trade of Kansas City* v. *United States,* 314 U.S. 534, 546 (1942). As the tribunal appointed by law,

and informed by experience, the Commission here did find upon consideration, of all evidence of record that the rates were not shown to be unlawful. In this connection also, when cross-examination was attempted to go beyond the so-called generalized statistics, the examiner applied the very simple rule of evidence that cross-examination could not go beyond the scope of the direct examination. See the ruling of the Court below. See also *Zumwalt* v. *Gardner*, 160 F. (2d) 298, 303, (6 Cir.), where it is stated that "it is a rule of the Federal courts that the cross-examination of a witness is confined to matters touched on in his direct examination." (Rule 43(b) of the Federal Rules of Civil Procedure).

As to the one cited instance, the cross-examination of John C. Howard, the record shows at page 244, the next page after the record reference given by appellant, that the question asked was not answered since the witness stated he was without knowledge to answer.

Appellant urges that its appeal presents important issues of substance and procedure. Such is not the case. The complaint case before the Commission was handled in its usual orderly manner and the Commission simply followed precedent in refusing to prescribe rates on a lower basis than that previously approved by it. The matters of procedural importance urged by appellant are of no moment since the Commission followed simple and normally applied rules of evidence. See the opinion of the Court below.

## CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

RALPH M. BUZEK
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## PROOF OF SERVICE.

I, Robert H. Bierma, one of the attorneys for the Rail Carrier Defendants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, and also upon the Solicitor General, Department of Justice, Washington 25, D. C., by mailing by air mail a copy thereof, properly addressed to said parties.

Dated at Chicago, Illinois, this 18th day of October 1963.

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ROBERT H. BIERMA

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# In the Supreme Court of the United States

OCTOBER TERM, 1963

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No. 506

FRANK ADAMS & CO., ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

---

**On Appeal From The United States District Court For The Southern District of Ohio, Western Division**

---

## MOTION TO AFFIRM

---

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, appellees, United States of America and Interstate Commerce Commission, move that the judgment of the district court be affirmed.

### STATEMENT

This is a direct appeal from a final order of a three-judge district court dismissing appellants' suit to set aside an order of the Interstate Commerce Commission entered in *Institute of Scrap Iron &*

*Steel* v. *Akron, Canton & Youngstown R.R. Co.*, 316 I.C.C. 55.[1] The Commission had held that the present rail rates on scrap iron and steel between points in Official Territory[2] are not unjust and unreasonable in violation of Section 1(5) of the Interstate Commerce Act, 49 U.S.C. 1(5), and do not result in an undue preference or prejudice in violation of Section 3(1) of the Act, 49 U.S.C. 3(1).

In 1929, in *Newport News Shipbuilding and Dry Dock Co.* v. *Baltimore & Ohio R. Co.*, 160 I.C.C. 620, the Commission modified the then existing structure of rates on scrap to prescribe as a maximum reasonable rate, minimum 44,800 pounds, a level 70 percent of the rate on manufactured iron and steel products, minimum 40,000 pounds (*infra*, p. 15). Although drastic reductions in the rates on certain manufactured iron and steel products (known as "list 2 articles") have been made since that time[3] in order to meet intense truck competition (*infra*, pp. 25-26), the relationship between the rates on scrap and the rates on the remainder of the manufactured products (known as "list 1 articles") has remained unchanged.

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[1] The Commission's Report is reproduced herein as an appendix, since the appellants did not append the Report to their jurisdictional statement.

[2] "Official Territory" includes the area east of the Mississippi River and north of the Ohio and Potomac Rivers.

[3] Reductions on "list 2 articles" have been made both by a reduction in the rate for 40,000 pound minimum, and by the establishment of new reduced rates for 80,000 and 100,000 pound minima.

In 1954 the eastern railroads established an alternate reduced rate for scrap useful for remelting purposes, minimum 80,000 pounds, at a level 87 percent of the existing rates on scrap, minimum 44,800 pounds (*infra*, pp. 15-16). These reduced rates were not tied by a percentage relationship to the reduced rates previously established on "list 2" manufactured iron and steel products of the same minimum weight.

In 1960 appellants, major processors and shippers of scrap in the Official Territory, filed a complaint with the Commission charging that present scrap rates are unjust and unreasonable in violation of Section 1(5) insofar as they exceed 70 percent of the prevailing rates on manufactured iron and steel products of the same minimum weight,[4] and that the present scrap rates are unduly prejudicial to shippers of scrap and unduly preferential of shippers of pig iron and iron ore, in violation of Section 3(1). They claimed that as a result of prejudicially high rates on scrap and preferentially low rates on iron ore and pig iron, steel-making consumers of scrap have been substituting iron ore and pig iron in their steel-making processes, to the prejudice of scrap iron. Appellants sought the establishment of new scrap rates on the following basis:

(1) minimum 80,000 pounds, based on 70 percent of the prevailing rate on manufactured iron and steel articles of the same minimum weight;

---

[4] In essence the complaint had reference to the lower rates which the Commission had established for "list 2" manufactured iron and steel products.

(2) minimum 100,000 pounds, based on 50 percent of the prevailing rate on manufactured iron and steel articles of the same minimum weight;
(3) no higher than 150 percent of the existing iron ore rates; and
(4) not exceeding 70 percent of the prevailing rates on pig iron.

After full administrative proceedings, the Commission (Division 2) concluded that appellants had failed to show that the existing scrap rates were in violation of either Section 3(1) or Section 1(5).[5] The Commission found that scrap had not been at a market disadvantage in comparison with iron ore and pig iron (*infra*, p. 30), and that, although the volume of scrap consumed had varied with changes in the volume of steel production, the relative consumption of scrap has been stable, whether measured in relation to steel production or to the volume of other raw materials consumed (*infra*, pp. 26-27). There was no evidence, the Commission noted, that the economic difficulties claimed by appellants were attributable to the rates on iron ore, pig iron or manufactured iron and steel. It found instead that they resulted from the decline in steel production and the increasingly severe competition among scrap dealers (*infra*,

[5] The hearing examiner, in a report which exhaustively treated the evidence and the contentions of the parties, had dismissed the complaint as being without merit.

p. 30). The Commission also compared the transportation conditions of iron ore, pig iron and manufactured iron and steel on the one hand with those of scrap on the other. Upon finding that there had been no showing of a substantial similarity in these transportation conditions or of a real disadvantage to appellants by reason of the assailed rates, the Commission concluded that undue preference and prejudice had not been established (*infra*, p. 31).

The Commission also held that appellants had not established their claim that the present rates on scrap are unjust and unreasonable. In coming to this conclusion, the Commission considered *inter alia* (a) the effect of the proposed rates on the revenues of the carriers, (b) data which showed the number of carloads of scrap moving in varying mileage blocks and which compared within each of these blocks the relationships to first-class rates of the present scrap rates and those sought by appellants, and (c) data comparing the present level of rates on scrap with that on other metallic materials (*infra*, pp. 20-23).

The three-judge district court in a *per curiam* opinion held that the Commission's conclusions "are based upon adequate findings supported by substantial evidence" (J.S. 23). The court rejected appellants' contention that certain typographical errors appearing in the Commission's report required reversal, and concluded that appellants had failed to carry the "burden of showing impropriety" (J.S. 24) in the rulings of the Commission's examiner on various objections raised to questions asked by appellants' counsel on cross-examination.

## ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court.

1. Appellants' main contention (J.S. 9-14) is that the Commission has abrogated the "70 percent formula" which it established in 1929 in the *Newport News* case for the relationship between rates on scrap, 44,800 pound minimum, and rates on manufactured iron and steel articles, 40,000 pound minimum, and that this has left scrap rates in a "confused and disorderly condition" (J.S. 13). However, even if the Commission's actions over the last ten years could properly be described as an abrogation of the *Newport News* formula—which we deny—this would afford no basis for upsetting the Commission's holding here that appellants had failed to show that existing scrap rates are unjust, unreasonable or unduly prejudicial. These, rather than *Newport News*, are the statutory standards.

Essentially, appellants' contention that present scrap rates are unlawful rests on the fact that they exceed 70 percent of the reduced rates allowed by the Commission on "list 2" manufactured iron and steel products, 80,000 pound minimum. These reductions, however, were authorized from time to time to enable carriers of "list 2" articles to meet severe truck competition.[6] As this Court has recognized

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[6] The comparative table set out in the Commission's report (*infra*, p. 26), illustrates the fact that the movement of scrap by rail has not been subjected to the tremendous pressure of truck competition as have manufactured iron and

(*Barringer & Co.* v. *United States*, 319 U.S. 1, 7-8; *Texas and Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 636-637, and cases cited therein), rates depressed by competitive influences may properly be regarded as an incorrect standard for measuring other rates. On the merits, the Commission properly held, consistent with its prior decision in *Twin City Iron & Metal Co.* v. *Baltimore & Ohio R. Co.*, 300 I.C.C. 281, that appellants had failed to justify an extension of the "70 percent formula" to rates on "list 2" articles depressed by truck competition.[7]

2. Appellants were afforded a fair hearing. Contrary to their contention (J.S. 8-9, 14-17), the Commission's examiner in no instance sustained an objection to a question asked by appellants' counsel on cross-examination on the ground that the information was confidential. The only citation given by appellants in support of this contention is Tr. 243 (J.S. 15). The entire colloquy (Tr. 242-244) on this point, however, makes clear that the examiner ruled that,

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steel articles. The statistics show that for the year 1959, about 4½ million tons of manufactured iron and steel articles moved by truck, compared with 21½ million tons by rail. On the other hand, only about 37 thousand tons of scrap moved by truck in the same period, compared with almost 12½ million tons which moved by rail.

[7] It may also be noted that, as appellants recognize (J.S. 12), the Commission has not applied the *Newport News* formula to rates other than those established on the basis of the 44,800 pound minimum. In this case appellants were seeking to have the formula extended to rates based on an 80,000 pound minimum (J.S. 12). Each of the cases cited by appellants (J.S. 11-12, n. 4), in which the Commission applied the "70 percent formula," involved scrap rates for minimum shipments of 44,800 pounds.

regardless of whether the witness had the right to plead that information is confidential, the issue of the validity of the plea was rendered moot because the witness had answered the question. Furthermore, at another point, the examiner in fact *overruled* an objection that the information requested was confidential and required the witness to answer the question (Tr. 303).

Full and complete cross-examination was permitted, limited only by the well recognized rule (*Houghton* v. *Jones*, 1 Wall. 702, 706; *Philadelphia & Trenton Railroad Co.* v. *Stimpson*, 14 Pet. 448, 460) that cross-examination must be limited to the scope of the direct examination.[8] The examiner's rulings, sustained by the lower court, were well within that "large amount of discretion in the conduct of a hearing [which] is necessarily reposed in an administrative agency" (*Reilly* v. *Pinkus*, 338 U.S. 269, 276) and present no issue warranting plenary consideration by this Court.[9] In any event, the examiner's re-

[8] The witnesses representing the various steel mills who intervened in the proceeding in opposition to appellants' complaint confined their direct testimony almost entirely to industry-wide conditions. Where the direct testimony was so limited, the examiner properly ruled that appellants were not entitled to cross-examination as to conditions in the individual steel mills, as such questions exceeded the scope of the direct testimony (Tr. 174-175, 178, 241-242). In a number of instances, however, where a witness had given direct testimony as to individual experiences of his own plant, cross-examination as to other details of the plant's individual experience was permitted over objection (Tr. 38, 132, 141, 180-181, 257).

[9] As a result of appellants' charges, the three-judge court during the hearing on the complaint requested the parties to

striction of the cross-examination in no way denied appellants the opportunity to introduce the same information by calling the same witnesses or by other evidence as part of their own case. See Tr. 288; Rule 56 of the Commission's General Rules of Practice, 49 CFR 1.56. The fact that this would have changed the order of proof presents no issue for review by this Court.

3. Appellants contend (J.S. 17-18) that the presence of certain errors in the Commission's report necessitates reversal of the order. It was pointed out in the answer filed by appellees in the lower court that the errors complained of (which related to undisputed facts as to the movement and average price of scrap and steel on various dates) were obviously nothing more than typographical errors. Furthermore, the errors affected neither the essential findings nor the ultimate conclusions of the Commission. The three-judge court accepted appellees' explanation and rejected appellants' contention. Thus, the threshhold issue is whether the errors were typographical, scarcely an issue warranting plenary review by this Court.

4. Appellants also suggest that various findings of the Commission are without support in the evidence—the findings as to the transportation charac-

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submit additional briefs. Each side submitted two supplemental briefs dealing, among other things, with the question of whether the examiner had improperly restricted appellants' cross-examination. The court concluded that "a thorough review of the record in this case" does not bear out appellants' complaint "that they were denied a fair hearing and due process of law by reason of the limitation placed on their cross-examination * * *" (J.S. 24).

teristics of scrap and the other commodities here involved, and the movement and consumption of scrap in Official Territory (J.S. 14-15, 18-19). The lower court, however, after reviewing the evidence, concluded that the contention was without merit and this factual determination warrants no further review. *Radio Corporation of America* v. *United States*, 341 U.S. 412, 420; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
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WILLIAM H. ORRICK, JR.,
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BETTY JO CHRISTIAN,
*Attorney,*

*Interstate Commerce Commission.*

OCTOBER 1963.

## APPENDIX

29756

## INTERSTATE COMMERCE COMMISSION

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No. 33535

INSTITUTE OF SCRAP IRON & STEEL, INC., ET AL v. AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.

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*Decided April 2, 1962*

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Rail rates on scrap iron and steel between points in official territory, found not shown to be unjust, unreasonable, or otherwise unlawful. Complaint dismissed.

*Howard Gould* and *David Reichert* for complainants.

*Robert H. Bierma, Benson T. Buck, Ralph M. Buzek, Richard E. Costello,* and *Richard J. Murphy* for defendants.

*Edward M. Boyne, Robert N. Burchmore, R. R. Clark, C. F. Coombs, W. G. Felton, John E. Gross, R. W. Kelly, F. W. Klos, John J. McDermott, Paul V. Miller, Warren Price, Jr., F. J. Walliser,* and *Robert R. Wertz* for various interveners.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, WEBB, AND HERRING

HERRING, *Commissioner:*

The complainants filed exceptions to the report proposed by the examiner, to which the defendants and

certain interveners replied. The defendants moved to strike certain matter in the complainants' exceptions as in violation of rule 1.96(a) of the General Rules of Practice. In view of our ultimate findings, no ruling on the motion is necessary. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By complaint filed on August 12, 1960, the Institute of Scrap Iron & Steel, Inc., hereinafter called the Institute, and 360 of its 500 members in official territory, all scrap dealers or brokers, allege that the present rail rates[1] on scrap iron or steel between points in official territory are unjust and unreasonable to the extent that they exceed 70 percent of the prevailing rates on manufactured iron and steel products, and that the higher level is also unduly prejudicial to dealers in scrap and unduly preferential of shippers and receivers of pig iron and iron ore. They seek removal of the alleged unlawfulness by the prescription of maximum rates on scrap iron, (1) minimum 80,000 pounds, based on 70 percent of the prevailing level of rates on manufactured iron and steel articles at the same minimum weight; (2) minimum 100,000 pounds, based on 50 percent of the above-mentioned iron and steel basis; (3) no higher than 150 percent of the existing iron ore rates; and (4) not exceeding 70 percent of the prevailing rates on pig iron.

The Northwestern Steel & Wire Company, a steel producer and consumer of scrap located at Sterling, Ill., is an intervener in support of the complainants. Certain other steel producers and consumers of scrap,

[1] Rates and rate differences are stated per gross ton, except as otherwise indicated, and do not include Ex Parte No. 223 general increases.

at numerous locations in official territory, intervened in opposition to the establishment of rates on scrap iron based on a specific relationship to rates on other raw materials of the steel industry or to unmanufactured iron and steel articles. None of these interveners is defending the present scrap rates, nor do they oppose the attempt here made by the complainants to obtain lower rates.

Scrap iron is important traffic to the railroads. The annual average movement within official territory in 1955 to 1959 was approximately 16 million net tons. The defendants' annual average revenue on scrap for the same period was $64 million. Scrap iron is described by the Commission in *General Commodity Rate Increases*, 1937, 223 I.C.C. 657, as—

> a low grade commodity of no value except for remelting and conversion into castings and billets. It is the principal raw material for the manufacture of iron and steel. About 50 percent of the total scrap iron annually consumed is a waste product of the steel mills and is remelted at these same mills. This "home Scrap", as it is called, therefore, requires no transportation. The other 50 percent is largely gathered from rural communities and other places where there is no local consumption and is shipped by rail in considerable quantities. Before shipment it must be sorted and prepared for the special uses of purchasers. The rail shipments load heavily, averaging about 42 net tons per car. Scrap requires no special equipment or expedited service, and there are few claims for loss or damage. The average rail haul is about 140 miles.

When *Increased Freight Rates, 1958*, 302 I.C.C. 665, was decided, the average rail haul had decreased

to 105 miles, and it is now 102 miles. Scrap iron ranges from very light to very heavy. Turnings are an example of light scrap and usually weigh between 45,000 to 58,000 pounds per car. Unprepared scrap generally averages less than 44,800 pounds. No. 1 heavy melting scrap is the most expensive of the many grades of scrap iron and usually loads from 96,000 to 125,000 pounds.

The production of steel in 1958-59 was 78.4 percent of 1956-57. This decline in steel production resulted in a like decline in the consumption of raw materials and in rail carloadings. For example, in 1958-59 scrap iron consumption was 77.7 percent of 1956-57, iron ore 74.4 percent, and pig iron 76.4 percent, and rail carloadings of scrap, iron ore, and pig iron aggregated 66.5 percent.

The volume of scrap consumption is closely tied to the volume of production of the steel industry. Over the years 1946 through 1959, the total consumption of scrap varied from a low of 36.5 million tons in 1946 to a high of 63.9 million in 1955. During this 14-year period, the average production of ingots and castings was 94,791,000 tons, as compared with the average consumption of scrap of 51,697,000 tons, or 54.5 percent, reflecting an average consumption of scrap of 1,090 pounds for each ton of steel produced. Despite the wide variations in the volume of scrap consumed, the ratio of scrap consumption to the production of ingots and castings has varied, during these years, within the narrow range of 52 and 57.2 percent. Thus, the volume of scrap consumed has varied between 1,040 and 1,144 pounds per ton of steel produced. In 1959, the figure was 1,090 pounds, exceeding the amounts for 1957 and 1958, and the same as the 14-year average.

Scrap prices are compared with steel production by months for the years 1958 through 1960, reflecting the composite average for Chicago, Ill., and Pittsburgh and Philadelphia, Pa. These comparisons show that changes in the price of scrap regularly precede changes in the volume of steel production. Thus, the price of scrap varies widely in accordance with demand. For example, starting when steel production was high after the end of the 1959 strike in the steel industry, scrap dropped from $45.67 per ton in November 1959 to $28.29 in November 1960, when steel production was steadily declining.

The price of pig iron has increased steadily since 1944, from $24.17 to approximately $70 in March 1961. Related in terms of percentages, using the Bureau of Labor Statistics price index for July 1960 (based on the 1946-49 average as 100), scrap is 88, or down 12 percent; iron ore 169.7, or up 69.77 percent; pig iron 162.5 percent, up 62.5 percent; and finished steel 186.7 percent, up 86.7 percent.

The rates on scrap iron originally were made on a system which grouped origin and destination points, and took account of the major domestic scrap iron markets comprised of the steel-producing areas. This system of commodity rates was partially modified in 1929 when the Commission, in *Newport News Shipbuilding & Dry Dock Co.* v. *B. & O. R. Co.*, 160 I.C.C. 620, prescribed as maximum on scrap iron 70 percent of the manufactured iron and steel rates, minimum 40,000 pounds, prescribed in *Iron and Steel Articles*, 155 I.C.C. 517. This prescription in specific cases from and to particular points did not affect all of the rates on scrap iron within official territory, as the commodity-rate structure which reflected origin and destination groupings provided many rates lower than the prescribed maximum. In 1954, the eastern rail-

roads approved a basis on scrap iron, minimum 80,000 pounds, reflecting 87 percent of the existing rates on scrap iron even though some of those rates were much below the level reflecting 70 percent of the iron and steel rates which had been prescribed as a reasonable maximum. The effect of the 1954 rate adjustment was (1) to provide the 87-percent basis of rates in connection with current commodity rates subject to a minimum weight of 56,000 pounds, as well as those subject to a minimum weight of 44,800 pounds; (2) to provide the 87-percent basis of rates in connection with the class 27.5 exceptions rating; and (3) to confine the list of commodities on which the 87-percent basis applied to those which are useful for remelting purposes only. Statistics taken from the Commission's 1-percent waybill study for 1952 to 1959 show that the level of scrap iron rates as measured against the basic first-class rates has fallen from 15.2 to 12.8 percent.

The scrap iron industry has borne the full impact of every ex parte increase except two since World War II. Commencing with Ex Parte No. 162, *Increased Railway Rates, Fares, and Charges, 1946*, 266 I.C.C. 537, the combined increases amount to 139.9 percent, not including the Ex Parte No. 212 or later increases. At the same time the rates on iron ore were increased 68.8 percent. In Ex Parte No. 212, the proposed increase of 40 cents per net ton was cut to 3 percent, maximum 40 cents, the amount suggested by the scrap industry. In Ex Parte No. 223, *Increased Freight Rates, 1960*, 311 I.C.C. 373, effective on October 24, 1960, scrap rates under $13 were increased by 10 cents per net ton or 11 cents per gross ton, and rates higher than $13 by 20 cents per net ton or 22 cents per gross ton.

The basic position of the Institute is that various technological advances in steelmaking have had an impact on iron and steel scrap by increasing the use of both iron ore and hot metal (molten pig iron) and serving to reduce the volume of scrap consumed; that scrap has been unable to compete effectively with these new processes because of low freight rates granted for iron ore, and to a lesser extent for pig iron; and that for the scrap industry to compete it must have an adjustment in the freight-rate structure to levels commensurate with those of iron ore, pig iron, and manufactured iron and steel articles.

The first technological advance is the direct charging of iron ore in steel furnaces. The Institute urges that these efforts are directed toward the elimination of the blast furnace, the unit which makes pig iron from iron ore. It fears that elimination of the blast furnace will decrease scrap consumption, and points to the 3,932,000 gross tons of scrap consumed in blast furnaces in 1956 as compared with 2,826,000 gross tons in 1959. In the meantime, blast furnaces have increased in production because of the sintering and pelletizing of iron ore, improved limestone, better coke, and oxygen. In connection with the increased use of iron ore, the Institute points to statistics showing an increase of 123.3 percent in the use of foreign iron ore in the period 1950-59.

A second technological change involves the basic oxygen converter process. This produces steel of an excellent quality in less time than is required in the standard open hearth. It does this with a charge which is largely hot metal. Scrap is not used to provide metallics, as in other steelmaking methods, but finds its major use as a working agent. During 1959, the percentage of scrap used in the basic oxygen process was 26.8 percent, as compared with 42.2 percent

in the open hearth. The Institute believes that with additional research the oxygen converter process would use additional scrap, but submits that there is little incentive to perform this research when hot metal can be made cheaply from iron ore moving at low freight rates. A third technological change is the use of high purity oxygen fed into open-hearth furnaces through lances which are inserted into the open hearth.

Aside from the foregoing technological changes in steelmaking, the Institute states that home scrap is being used in increasing amounts. In 1950, 26 percent of home scrap was consumed, and in 1959 the percentage increased to 29.1 percent. In 1954, 632,509 net tons of scrap moved by barge, and in 1958 this figure had grown to 1,044,783 tons. While scrap consumption fell 30.4 percent in the period 1956-58, truck movements declined by 23.5 percent and rail movements by 48.08 percent.

Between 1956 and 1959, there was a decline of approximately 9.4 million tons, or 27 percent, of purchased scrap consumed by both steel mills and foundries. During this time, steel production declined only 17 percent. According to the Institute, the difference between these two figures represents scrap sales that were lost by the scrap industry to hot metal made from iron ore, much of it from foreign countries, transported by vessels largely owned by the steel companies, and handled from the ports of New York, N.Y., Philadelphia, and Baltimore, Md., at rates 25 to 35 percent of the rates on scrap iron for the same distances.

Thirteen scrap dealers and brokers in official territory, who do not themselves generate or consume scrap, testified mainly as to the conditions from 1958 to 1960. These complainants buy, prepare, and sell

scrap, and their direct competition is with other dealers. They take the position, among other things, that a large percentage of scrap movements are restricted to short hauls because the rates absorb too much of the actual value of the commodity. From Philadelphia to Bethlehem, Pa., 57.8 miles, the scrap rate is $3.85, minimum 80,000 pounds, as compared with the iron ore rate of $2.12. From Albany, N.Y., to Ashland, Ky., and Portsmouth, Ohio, iron ore moves at $5.13, as compared with the scrap rate of $18.38, minimum 80,000 pounds. On the same minimum weight, the manufactured iron and steel rates from Ashland are equal to or lower than the 80,000-pound scrap rates to Bethlehem, Philadelphia, Phoenixville, and Conshohocken, Pa. From Baltimore to Ashland, Pittsburgh, and Warren and Youngstown, Ohio, iron ore moves at rates of $4.14, $3.29, $3.47, and $3.47, respectively, and the scrap rates are $14.58, $10.87, $12.47, and $12.47. From Cleveland to Hamilton and Middletown, Ohio, the scrap rate is $8.58, as compared with the new steel rates of $8.06 and $7.84, respectively, a pig iron rate of $7.45, and an iron ore rate of $2.82. The rates on scrap represent 25 to 70 percent of its delivered price.

In 1929, new steel sold for about $50 per ton and scrap a third less. Today, the premium grade of scrap sells for under $90 per gross ton while new steel generally averages between $120 and $150. In 1959, new steel moved on 90,000-pound rates and scrap on 44,800-pound rates. Today, virtually no steel moves on the 90,000-pound rates. One of the largest scrap iron brokers in the United States, handling several million tons each year, testified that its shipping range has been narrowed to 200 miles from Chicago because of high rates. For example, during 1946, from Evansville, Ind., to Chicago the 80,000-

pound scrap rate was $3.58; today it is $8.91, although the market price of scrap is lower than in 1946. From Chicago to Canton, Ohio, the scrap rate is $10.67, minimum 80,000 pounds, while pig iron moves at $10.56 and finished steel at $10.53. In previous years this broker was able to ship 300 miles at rates under $5 per ton to western Ohio, Indiana, Illinois, and Michigan.

Two nonintegrated steel companies support the complainants, the Green River Steel Corporation at Steelton, Ky., and the Northwestern Steel and Wire Company with plants at Sterling and Rock Falls, Ill. The former is dependent entirely upon scrap generated in Illinois, Indiana, Michigan, and Ohio to supply its two large electric furnaces with 100,000 to 150,000 tons of scrap iron annually. During a recent 12 months, the latter company received over 900,000 tons of scrap by rail, plus substantial truck tonnage. While it does not use pig iron, iron ore, or hot metal, it does compete with mills who use these ingredients. It emphasizes that the present scrap rates in official territory follow no consistent rate or mode of progression, that in many instances they are higher than the present rates on manufactured iron and steel articles, minimum 80,000 pounds, and that iron ore rates are on a substantially lower level than scrap rates and lower than iron and steel rates.

The defendants developed a traffic study covering the actual movement of scrap in 12,515 cars between points in official territory for the period October 16 to November 17, 1960. Approximately 70 percent of the cars in the 60,000- to 80,000-pound bracket moved at the 87-percent reduced basis with an average loading of 45.04 gross tons per car and an average haul of 102 miles. The average revenue per gross ton was $4.48, and the average short-line distance is 91

miles. The basic 28300 first-class rate for 91 miles is $1.56 per 100 pounds, and the average scrap iron rate is 12.8 percent of first class. The 70-percent basis sought by the complainants would reflect a rate level approximately 71 percent of the one presently in effect, with a reduction of almost 30 percent, and would result in an annual reduction in defendants' revenues of about $8,726,000. The 50 percent basis as sought would produce 51 percent of the existing rates, with an annual revenue reduction approximating $15 million. Admittedly, the traffic that moved during the study period represents a reduced volume of business. To determine the representative nature of the study, the results were compared with a study covering 22,046 carloads in March 1959, and with the Commission's 1-percent waybill study for 1958. The March 1959 study showed an average loading of 102,161 pounds, as against slightly over 100,000 pounds developed by the traffic study. The waybill study also indicated an average loading of 100,000 pounds.

The complainants argue that no consideration should be given to the traffic studies and to the results developed therefrom because the reduced rates sought would produce additional revenue by generating the movement of more scrap and increased loadings. The defendants' experience under the 87-percent basis does not lend support to the complainants' arguments. In 1953, the waybill study designated as Statement TD-1 showed revenues on scrap iron from official to official territory of $68,840,200 from 17,610,700 tons. In 1955, the same publication showed revenues of $59,988,400 from 18,661,800 tons.

The following table, based on the latest available data, shows the number of carloads of scrap moved in the mileage blocks indicated, and the first-class

relationships reflected by the scrap rates on the two bases sought as well as by the present rates:

| Mileage blocks | Number of cars | Relationship to first-class rates | | |
|---|---|---|---|---|
| | | 70-percent basis | 50-percent basis | Present scrap basis |
| | | *Percent* | *Percent* | *Percent* |
| 1 to 25 | 64,300 | 4.6 to 7.3 | 3.3 to 5.2 | 9.0 |
| 26 to 50 | 44,600 | 7.3 to 9.7 | 5.2 to 6.9 | 10.6 |
| 51 to 75 | 28,000 | 9.8 to 9.6 | 7.0 to 6.9 | 13.7 |
| 76 to 100 | 26,100 | 10.2 to 10.3 | 7.3 to 7.4 | 13.6 |
| 101 to 150 | 25,000 | 10.0 to 10.4 | 7.2 to 7.4 | 15.0 |
| 151 to 200 | 13,800 | 10.2 to 11.6 | 7.3 to 8.3 | 15.6 |
| 201 to 250 | 7,900 | 11.3 to 12.0 | 8.1 to 8.6 | 16.0 |
| 251 to 300 | 7,300 | 12.3 to 12.2 | 8.8 to 8.7 | 15.8 |
| 301 to 355 | 3,900 | 12.3 to 12.2 | 8.8 to 8.7 | 15.8 |
| 356 to 400 | 2,800 | 12.2 to 12.8 | 8.7 to 9.1 | 17.4 |
| 401 to 450 | 1,600 | 13.8 to 13.5 | 9.9 to 9.7 | 17.4 |
| 451 to 500 | 1,400 | 14.1 to 14.7 | 10.3 to 10.5 | 18.0 |
| 501 to 600 | 1,600 | 15.8 to 15.5 | 11.3 to 11.1 | 18.0 |
| 601 to 700 | 800 | 15.0 to 15.0 | 11.1 to 10.7 | 16.0 |
| 701 to 800 | 800 | 15.2 to 14.8 | 10.9 to 10.6 | 16.0 |
| 801 to 900 | 200 | 15.1 to 15.0 | 10.8 to 10.7 | 17.0 |

It will be noted that, on the 50-percent basis, the complainants are seeking rates in the mileage blocks up to 50 miles on a basis averaging about 5 percent of first class, the approximate basis on which the lowest related commodity, coal, moves in official territory. Coal has an average loading of 128,000 pounds, as compared with 100,000 pounds for scrap.

The table below compares the present level of rates on scrap with the level of rates on other metallic materials moving in volume and loading heavily in official territory:

| Commodity | Relationship to first class | | |
|---|---|---|---|
| | Interstate | Intrastate | Composite |
| | *Percent* | *Percent* | *Percent* |
| Railway track material | 21 | 18 | 20.4 |
| Nails, wire | 20 | 16 | 19.3 |
| Iron and steel pipe fittings | 20 | 13 | 18.5 |
| Alloys, steel, manufactured | 18 | 19 | 18.1 |
| Remelting scrap | 18 | 17 | 17.9 |
| Manufactured iron and steel | 19 | 14 | 17.5 |
| Cast iron pipe fittings | 17 | 14 | 16.7 |
| Lead, zinc bars | 16 | 12 | 15.3 |
| Pig iron | 15 | 12 | 14.1 |
| Iron and steel n.o.s. | 15 | 10 | 13.2 |
| Scrap iron | 15 | 11 | 12.8 |
| Iron and steel bars | 14 | 9 | 12.7 |
| Iron and steel borings | 13 | 11 | 12.2 |
| Billets, blooms | 15 | 8 | 11.7 |

*Iron ore.*—The movement of iron ore is highly concentrated. Ninety percent of the total traffic moves from seven Lake ports and three north Atlantic ports, and is delivered to the railroads by vessels in quantities averaging over 12,000 gross tons at the Lake ports and 23,000 gross tons at the Atlantic ports. The remainder of the iron ore traffic originates at eight domestic mine origins and moves in quantities amounting either to trainloads or substantial fractions of trainloads. The entire traffic, amounting to over 60 million net tons in 1957, is delivered at approximately 90 destinations where blast furnaces are located. By contrast, scrap iron moves from many points, 501 origins in a typical month. A study made by the Bethlehem Steel Company showed 263 origins, with individual plants receiving scrap from as many as 115 origins. Although the origin and destination points for iron ore are constant from year to year,

there are frequent changes in the origins from which particular mills obtain their scrap.

The average weight per carload differs widely, iron ore loading in excess of 70 net tons and scrap to 50 net tons. While iron ore moves largely over single-line direct routes, scrap moves over a multiplicity of routes, some of which are extremely circuitous. Because iron ore is frequently delivered to the railroads in quantities in excess of trainloads, it does not require the very expensive terminal services involved in way train and classification-yard services which are characteristic of the movement of any commodity such as scrap, where the typical movement is a single carload. Both iron ore and scrap are transported in open-top equipment, but this is true of about 58 percent of all the carload traffic within official territory. Iron ore rates have never been related to the rates on scrap, but have been designed to suit the needs of the iron ore traffic, ex-lake, ex-tidewater, and locally within eastern territory, and in the light of competition between lakefront and seaboard mills, on the one hand, and interior furnaces, on the other.

*Pig iron.*—Pig iron moves from relatively few origins. Scrap moves to almost all steelmaking locations while pig iron moves largely to foundries and steel furnaces not integrated with blast furnaces. The average carloading of scrap, as stated, approximates 50 tons, whereas pig iron loads to about 60 tons. Scrap generally moves for shorter distances than pig iron. The eastern railroads have carried between 1.5 and 3.5 million tons of pig iron annually in recent years. Approximately 43,000 cars were used for this movement between points in official territory in 1959. Unlike scrap, pig iron moves with considerable regularity between the same origins and destinations over the same routes.

*Manufactured iron and steel articles.*—While scrap iron moves from many origins to relatively few destinations, manufactured iron and steel articles move almost everywhere. These movements include those from the many plants of the basic producers and also the secondary movements to and from manufacturers, fabricators, and warehouses located at numerous points throughout official territory. The movement is not confined to shipments to and from the steelmaking furnaces nor to the steel industry, but is widespread throughout almost every type of industry. The volume of manufactured iron and steel is far greater than that of scrap. The average carload of iron and steel is 33 tons for nails and wire, 43 tons for items classified as manufactured iron and steel, and 37 tons for pipe. Scrap moves for much shorter distances, and usually in the direction opposite from that of iron and steel.

Reduced rates on manufactured iron and steel were established in 1950 following a great expansion in the movement of these articles by motor carriers in the years immediately following World War II. Those rates were initially published to become effective on May 1, 1950, and were designed to equal the motor carrier rates on the bulk of the iron and steel moving by truck. The rates were increased soon after their publication, following the general authorizations in Ex Parte No. 175, *Increased Freight Rates, 1951*, 284 I.C.C. 589, by 4 percent on April 4, 1951, an additional 5 percent on August 28, 1951, and to a total of 15 percent effective May 2, 1952. On March 26, 1954, the railroads again reduced their rates on iron and steel articles to reflect the going level of most of the motor carrier rates. These reduced rates were published to apply on a limited list of manufactured iron and steel articles, principally the flat-rolled

products which were particularly susceptible to motor transportation.

Truck competition on manufactured iron and steel articles is much more severe than on scrap, and is effective at substantially all distances, whereas motor transportation of scrap is concentrated largely in the shorter hauls, principally to assembly yards. For such hauls, in addition to the lower level of motor carrier rates, advantages of motor carriage include shorter transit time, greater flexibility of service, and savings in plant handling costs and in smaller inventories due to lower minimum weights and rapid delivery. A further factor is a saving in the expense of blocking and bracing the load, which is required by rail and not by motor. Shrouding and wrapping expense on rail shipments can generally be avoided by the use of trucks. These considerations either do not exist in connection with the movement of scrap, or they carry greater significance in the transportation of manufactured iron and steel.

The following table shows the lack of motor carrier competition in the transportation of scrap and its acute presence in the transportation of manufactured iron and steel articles:

| Year | Iron and steel | | Scrap | | Index of steel production |
|---|---|---|---|---|---|
| | Motor | Rail | Motor | Rail | |
| 1946 | [1] N.A. | 29,836,365 | [1] N.A. | 10,388,189 | 100.0 |
| 1956 | 3,941,083 | 31,022,693 | 56,650 | 17,133,920 | 173.0 |
| 1957 | 3,529,891 | 29,873,380 | 44,230 | 14,772,928 | 169.3 |
| 1958 | 3,623,750 | 19,196,697 | 35,147 | 9,439,991 | 126.6 |
| 1959 | 4,414,692 | 21,500,033 | 37,086 | 12,399,204 | 140.3 |

[1] Not available.

The evidence establishes that while the volume of scrap consumed has varied with changes in the volume of steel production, the relative consumption of

scrap has been stable whether measured in relation to total steel production or in relation to the volume or other raw materials consumed. The totals of the tonnage of all major raw materials consumed by the steel industry, as reported by the American Iron and Steel Institute, show that for 1959, compared with 1947-49 averages, scrap was the only major raw material that showed an increase in volume consumed. In the same period, consumption of iron ore decreased 11 percent, coal 23 percent, and limestone 36 percent. The tons of scrap consumed per ton of pig iron produced increased 11 percent between 1948 and 1959, while the tons of iron ore decreased 10 percent. Pig iron production in both years was 60 million tons. Thus, of the four basic raw materials entering into the production of steel, scrap is the only one which has not declined in consumption per ingot ton produced. The percentage of scrap to iron ore for 1959 was 47.5 percent, as compared with 43.8 in 1958 and 41.5 in 1957.

Scrap and iron ore are major raw materials in the two separate processes by which steel is produced. Blast furnaces perform a smelting process whereby the iron is separated from the impurities in iron ore. Their primary raw materials are the ore, which provides the metallic content of the product, and coke and limestone, ingredients required to produce the chemical reactions in the furnace. The function of a steelmaking furnace, by contrast, is to refine iron and scrap into steel. The primary ingredients are pig iron and scrap. To those primary raw materials are added the small quantities of iron ore, limestone, and other materials required by the chemistry of the process. Scrap in blast furnaces accounts for less than 2 percent of the total charge and to between 2 and 3 percent of the ore. The scrap thus used con-

sists primarily of home scrap and is of a type that is unsuitable for open hearth use, such as broken skulls, pit and ladle scrap, and other contaminated irons. In steelmaking furnaces, the tonnage in scrap consumed amounts to approximately one-half, whereas the iron ore tonnage amounts to only a small fraction, of the tons of steel produced. Since the two commodities are used largely in different processes, there is small room for competition between them.

While scrap encounters no important competition from iron ore, its use in steelmaking furnaces is, to some extent, alternative to the use of pig iron. For example, in 1959 the percentage of scrap to the total tons of scrap and hot metal amounted to 7.8 percent in bessemer converters, 44.1 percent in open hearths, and 81.6 percent in electric and basic oxygen furnaces. These differences in percentages of scrap consumption are made more meaningful when considered in connection with the relative shares of total steel production by each type of furnace. Of the total production of steel in 1959, bessemer converters contributed 1.5 percent, open hearths 87.8 percent, electric furnaces 8.7 percent, and basic oxygen furnaces 2 percent. Throughout the period 1948-59, the percentages of scrap tons to the total tons of scrap and pig iron consumed in steelmaking furnaces varied from the average for the entire period by no more than 2 percent.

The evidence is conclusive that none of the new processes in steelmaking has had any significant effect upon the proportion of scrap used in the production of steel. The direct charging of iron ore in steelmaking furnaces has been a characteristic of the process throughout its history, and its use in furnaces is not to replace scrap but to supply the oxygen required by the process. The oxygen converter is

neither a blast furnace nor an open hearth, but a new type of steel-making furnace different from either that smelts pig iron and scrap to produce steel. In 1959, the first year for which separate data for this type of furnace were published by the American Iron and Steel Institute, the total production process amounted to 1,864,338 net tons. In that same year, scrap consumption in steelmaking furnaces amounted to 45,846,896 net tons, equal to 49.7 percent of the 92,175,540 net tons of ingots and castings produced in that year.

The use of oxygen converters has not had any significant effect upon the consumption of scrap by the steel industry. The use of oxygen lances tends to limit the amount of ore charged to open-hearth furnaces. The use of gaseous oxygen has not changed the ratio of scrap to pig iron, and there is no indication that it will do so in the future. Purchased scrap has provided a nearly constant portion of the total scrap consumed by the steel industry, reflecting 1955-59 percentages of 41, 43, 38, 37, and 40, respectively.

Between 1956 and 1959, scrap consumption was on approximately the same level as steel production, and it was iron ore, not scrap, which suffered the decline in consumption during this period. Total steel industry consumption of scrap in 1959, 47.5 percent, was higher in relation to iron ore consumption than in any previous year since 1952.

Only a small portion of import ore is handled in steel-company-owned vessels; the great bulk of the tonnage is carried in vessels on time or trip charter at going rates in the world market, which fluctuates widely with conditions of supply and demand for bottoms. In 1959, the total actual importations through the port of New York was only 359 gross tons.

*Conclusions and findings.*—It seems clear that scrap iron has not been at a market disadvantage in comparison with iron ore and pig iron. There is no evidence before us which would suggest that the difficulties testified to by the scrap dealers since 1958 are attributable in any major degree to the rates on iron ore, pig iron, or manufactured iron and steel. The difficulties of the scrap dealers result from the decline in steel production beginning in 1958, and the increasingly severe competition among scrap dealers and brokers. The experience of particular scrap dealers can be of value only if the experience is shown to be representative of the industry as a whole.

There remain for consideration the claims that the present rates on scrap iron are unjust and unreasonable per se. Much of the evidence bearing on this issue has previously been discussed. As noted, the present scrap rates average 12.8 percent of the basic No. 28300 first-class rates. None of the rates that move traffic, as shown by the defendants' traffic study, is in excess of 21 percent of first class. The southwestern and southern rates, which apparently are satisfactory to the complainants, reflect 21 percent of first class, minimum 50,000 pounds, and 18 percent of first class, minimum 80,000 pounds, a basis considerably in excess of the average level on scrap here assailed.

The rates on scrap iron and on other raw materials of the steel industry have always been made to reflect circumstances and conditions particular to each transportation service. The complainants' rate comparisons relate almost exclusively to long hauls. As pointed out, scrap iron within official territory moves mostly for short hauls, which is not true of the other traffic with which comparison is thus made.

An analysis of the short-haul movement in the traffic study shows that out of a total of approximately 4,300 carloads which moved for a short-line distance of 50 miles or less, about 3,200 moved for the account of members of the Institute. The rates at which the traffic moved reflected an average of approximately 10 percent of first class. Many of the rates shown by the complainants are between points where there is no movement. For the most part, the prevailing scrap iron rates at the 87-percent basis are lower than the pig iron rates, despite the fact that pig iron has an 18-percent higher average loading than scrap iron. Moreover, some of the pig iron rates used for comparative purposes have been reduced to meet water competition; for example, the water-competitive rates from Buffalo, N.Y., to Philadelphia and Baltimore, and the water-truck competitive rates from Buffalo to Coatesville and Phoenixville, Pa.

Undue preference and prejudice must be shown by clear and convincing evidence. Substantial similarity in transportation conditions, and a real disadvantage by reason of the assailed rates, must be shown. Such a showing has not been made on this record. As noted, the transportation characteristics of iron ore, pig iron, manufactured iron and steel, and scrap differ widely. Moreover, there is no justification from a transportation standpoint for requiring a rigid relationship between the rates on scrap and the rates on any of these other commodities.

We find that the assailed rates on scrap iron and steel between points in official territory are not shown to be unjust, unreasonable, or otherwise unlawful. The complaint will be dismissed.

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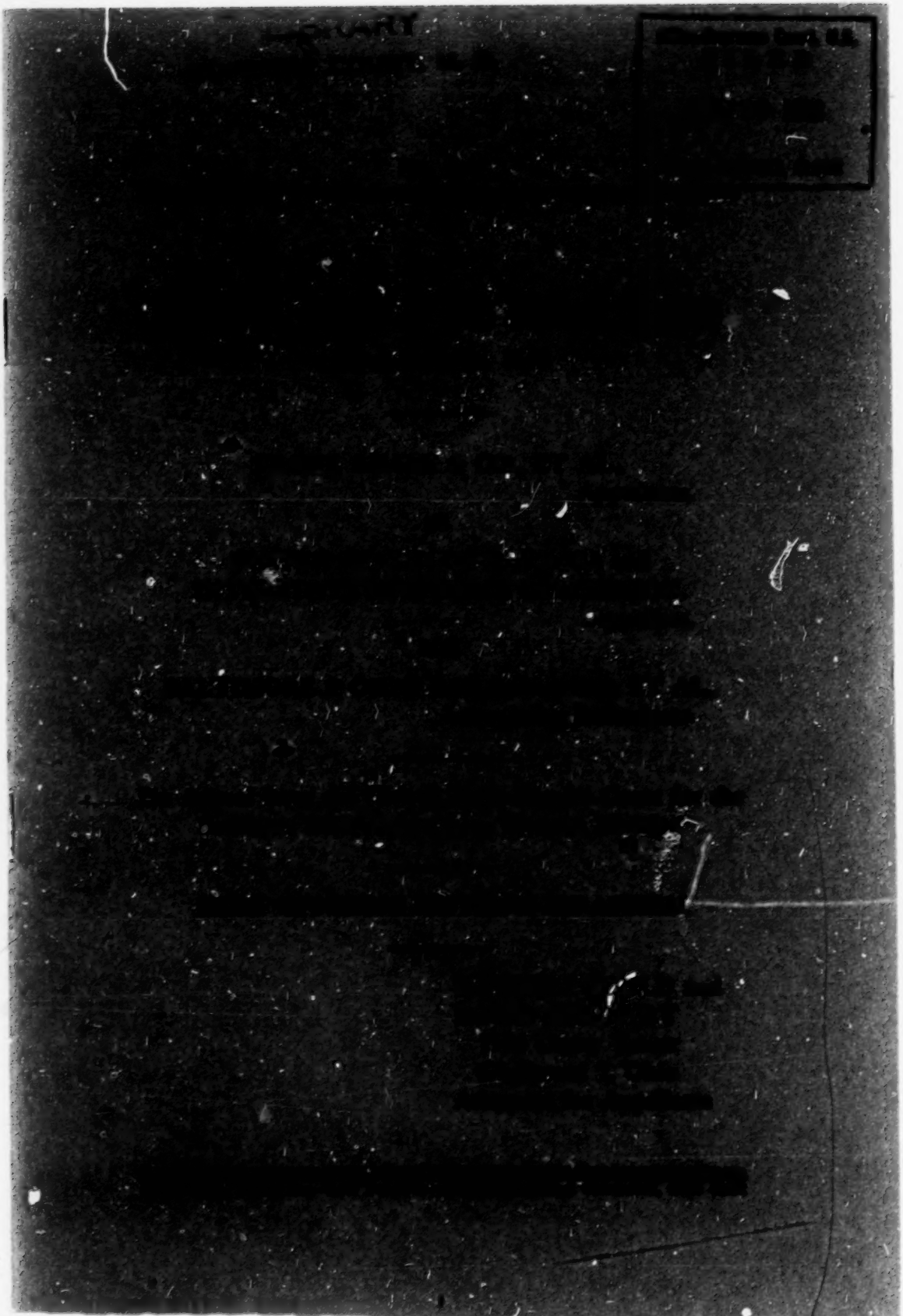

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In the

# Supreme Court of the United States

**October Term, 1963**

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No. 506

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FRANK ADAMS & CO., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees,

and

BALTIMORE & OHIO RAILROAD CO., ET AL.,
Intervening Defendants.

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**On Appeal from the United States District Court for the Southern District of Ohio, Western Division**

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## BRIEF OPPOSING MOTIONS TO AFFIRM

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### STATEMENT

Pursuant to Rule 16(3) of the Revised Rules of this Court, appellants file this brief opposing the separate

motions to affirm of the United States of America and the Interstate Commerce Commission, appellees, and the Baltimore & Ohio Railroad Co., et al, intervening defendants.

## I. Appellees' Motion

1. Appellees fail to meet the allegations of violations alleged in appellants' complaint by deviating into comparisons of rates on scrap iron and truck compelled "list 2" manufactured iron and steel products (Appellees' Motion p. 6). The crux of appellants' case is that steel producers have switched their purchase of basic raw materials from scrap iron to iron ore and pig iron, principally because the latter commodities are economically preferable by reason of their being transported by the intervening defendant railroads at subnormal freight rates. Neither appellees nor the intervening defendants deny that iron ore moves at rates one-third to one-fourth scrap rates as asserted by appellants (J.S. 14), which accounts for the 69.7 percent increase in iron ore prices, 62.5 percent increase in pig iron prices and 12 percent decrease in scrap prices since 1947-49 (J.S. 18).

With reference to the action of the intervening defendant railroads in reducing manufactured iron and steel rates to meet truck competition, this Court has repeatedly held "that competitive factors . . . are no justification for . . . discrimination,"[1] and that "the purpose of Congress (in enacting the Interstate Commerce Act) was to cut up by the roots every form of discrimination, favoritism and inequity."[2] See also *United States* v. *Illinois Central Railroad Co.*, 263 U.S. 515, 524.

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[1] Justice Douglas dissenting in *Barringer & Co.* v. *United States*, 319 U.S. 1, 18.

[2] Chief Justice Stone dissenting in *Texas & Pacific Railway Co.* v. *United States*, 289 U.S. 627, 658-659, in which Justice Hughes, Brandeis and Cardoza concurred.

By what logic does the 70 percent rule, steadfastly adhered to by the Commission for 34 years in comparing 44,800 pound scrap rates to 40,000 pound manufactured iron and steel rates, become an improper standard when comparing 80,000 pound scrap rates to 80,000 pound manufactured iron and steel rates?

How do appellees rationalize the testimony of the intervening defendant railroads and the findings of the Commission in contemporaneous general rate increase cases that rates on iron ore are admittedly depressed and that iron ore received favored treatment in past general rate increase cases? (Tr. 133, 136-138; *Increased Freight Rates*, 1958, 302 I.C.C. 665, 690.) It is with iron ore and its products, hot metal and pig iron, that scrap competes, and not one pound of iron ore moves by truck.

2. Appellants were not afforded a fair hearing. The examiner made it crystal clear during the proceedings that he would uphold the right of the witnesses for the intervening steel mills to refuse to answer questions on the grounds of confidential information (Tr. 243). Surely appellants were not required to uselessly pursue a line of questions forbidden by the examiner which would only serve to delay the proceedings and antagonize the trier of facts. The one objection cited by appellees (Appellees' Motion p. 8) which the examiner did overrule followed testimony in which the witness cautiously answered the question, "For the record, no." (Tr. 303).

Objections to appellants' questions that exceeded the scope of direct examination are not at issue here (Appellees' Motion, p. 8, second sentence, footnote 8). Moreover, appellees mistakenly apply common law rules of proof not applicable in administrative proceedings of this type. *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25, 44; Rule 1.75, General Rules of Practice, Interstate Com-

merce Commission; *Jersey City* v. *United States*, 54 F.S. 315, 316; *Southern Stevedoring Co.* v. *Voris*, 190 F.2d 275, 277.

Further, in those few instances where witnesses were required to answer over objections, the questions went to matters of general knowledge of each witness and not to details of that witness' own plant. (Appellees' Motion p. 8, footnote 8). Of the five references to the transcript cited in the last sentence of footnote 8 of Appellees' Motion, three pertained to questions propounded to the two witnesses for the railroads who were not associated with any particular railroad, but were employed respectively by the Traffic Executive Association-Eastern Railroads and the Central Territory Railroads Association.

3. If the material, admitted errors of the Commission were in fact typographical, why were these not corrected rather than perpetually memorialized in the official published reports of the Commission? Where the Commission has misread exhibits, its orders have been enjoined. *Pacific Inland Tariff Bureau* v. *United States*, 134 F.S. 210, 213.

4. The decision of the District Court that there was no merit in appellants' contentions that the Commission's findings were without foundation, does not of itself, prevent this Court from further review. "So long as the Congress has deemed it right to subject the orders of the Commission to review by this Court, the duty of analyzing the essential issues of an order cannot be escaped by too easy reliance on the conclusion of a district court or on the indisputable formula that an exercise of discretion by the Commission is not to be displaced by a contrary exercise of judicial discretion." *Dubitante* of Justice Frankfurter in *Radio Corporation of America* v. *United States*, 341 U.S. 412, 423. See also *Florida* v. *United States*, 282 U.S. 194, 215; *The Pennsylvania Railroad Co.* v. *United*

*States*, 99 F.S. 394, 400, affd. 342 U.S. 890; *Southern Railway Co.* v. *Virginia*, 290 U.S. 190, 195.

## II. Intervening Defendants' Motion

1. Intervening defendants refer to the Commission's finding that "some (scrap) rates" are much below the 70 percent level (Intervening Defendants' Motion p. 2). The Commission and the intervening defendants are referring to rates reduced because of water or truck competition and inter-plant rates between steel mills which are either paper rates or not susceptible to use by commercial scrap dealers. Such depressed rates have not been assailed by appellants and are not the subject of this appeal.

2. Appellants alleged that railroads in every territory in the United States except Official Territory had adjusted rates on scrap (Complaint, paragraph XXIV, p. 10, 11). The Commission and intervening defendants improperly compare the level of rates in Official Territory to those in the South and Southwest. Such comparisons are distorted because of the vast difference in conditions existing in the respective territories. For example, the movement of scrap in Official Territory accounts for 75 percent of the scrap shipped in the United States. *Increased Freight Rates*, 1958, 302 I.C.C. 665, 696. Further, the scrap handled by the Eastern railroads is principally heavy loading industrial and dealer-prepared scrap, while most of the scrap shipped in the South and Southwest is so-called country and unprepared scrap having lesser weight per car and shipped for longer mileage.

3. Intervening defendants assert that the assailed rates were previously found lawful by the Commission. This is not true. What the Commission did find in more than forty cases is that 44,800 pound scrap rates were unreasonable insofar as they exceeded 70 percent of 40,000 pound

manufactured iron and steel rates. The intervening defendant railroads admitted that they had opposed this relationship for years, but finally capitulated in its validity and have recently awarded reparations upon application by postal card from shippers (Tr. 70). No doubt this accounts for the few reparations cases, if any, filed since 1955 (Intervening Defendants' Motion p. 2), although more than forty cases had been decided prior to 1955 (J.S. 10-12).

4. Intervening defendants allude to the Commission's finding that transportation conditions and loading characteristics of manufactured iron and steel and scrap differ widely (Intervening Defendants' Motion p. 5). It is incredible that the Commission could reach this conclusion in view of the directly contrary testimony of the defendant railroads' chief witness (Tr. 47), the intervening steel mills' chief witness (J.S. 18), and the findings of the Commission itself in more than forty previous cases (J.S. 10-12).

5. Intervening defendants have mistakenly applied Rule 43(b) of the Federal Rules of Civil Procedure to these proceedings. That the Federal Rules of Civil Procedure do not here apply is so patently clear, further rebuttal is unnecessary. Rule 1, Federal Rules of Civil Procedure; *Interstate Commerce Commission* v. *Baird, supra*. However, since intervening defendants incorrectly state that the basis for the examiner's assailed ruling was "that cross-examination could not go beyond the scope of direct examination" (Intervening Defendants' Motion p. 6), it is necessary to repeat *verbatim* the examiner's mandate on page 243 of the transcript referred to on page 15 of appellants' jurisdictional statement:

> "Exam. Luttrell: He said he thought it was confidential information that he thought he should not reveal. I am ruling that the intervenor has the right to plead that."

## CONCLUSION

In the interest of substantial justice and in fairness to 360 appellants it is submitted that refusal to review the instant case on its merits will result in grave and irreparable damage. Succinctly, the following would be the inevitable results:

1. Scrap iron in Official Territory would not be related to iron ore, pig iron or manufactured iron and steel products by reason of the decision of the District Court below. This conclusion destroys thirty-four years of precedent and overrules every previous yardstick decision of the Federal Courts and the Interstate Commerce Commission since the *Newport News* case. Since neither the District Court below nor the Interstate Commerce Commission have ever indicated what scrap iron would be related to, it would appear that the present scrap rates would be an anomaly in the railroad tariffs henceforth and forever.

2. The decision of the District Court affirming the Interstate Commerce Commission would approve subnormal iron ore rates and provide that manufactured pig iron and new steel products should move on cheaper freight rates than scrap iron in Official Territory, although this is not the case in Southern Territory, Southwestern Territory, Mountain Territory, Western Trunk Line Territory, and North and South Pacific Coast Territories. In effect, refusal to review the merits of this case would place a judicial stamp of approval on scrap iron becoming an "orphan" in railroad tariffs with the shippers forced to pay whatever the traffic would bear.

3. Refusal to review the decision of the District Court would affirm a doctrine that eleven integrated steel mills owning their own blast furnaces could move both their raw material and manufactured products at abnormally

low rates subsidized by the abnormally high rates paid by scrap dealers.

4. If the instant case stands affirmed, then 360 appellants become victim to economic sanctions applied by steel mill interveners and railroad defendants having no regard for the continued existence of an industry which has made superlative efforts to maintain the nation's economy and its defense resources during three critical times in this nation's history — 1917-1920, 1941-1946 and 1950-1952.

5. If the District Court and the Interstate Commerce Commission's decisions are affirmed, the present level of railroad rates will exhaust as much as 50 percent of the delivered price of scrap iron at the furnace doors of steel producers. The decision would condone such flagrant practice as that exemplified by the following transcript excerpts from the defendant railroads' chief witness; page 146, lines 8 through 25 and page 152, lines 8 through 19:

> "Q How did you arrive at what those rates were to be on imported iron ore from Baltimore and Philadelphia and Hampton Roads; what yardstick did you use in your rate making?
>
> A. They, of course, were made by the highest order of railroad executives that we have, and they were based on long negotiations with the steel people.
>
> Q You mean the Presidents Conference?
>
> A At times they went up to the Presidents Conference. I was thinking mainly of the Traffic Executives.
>
> Q You mean they didn't go to the Section 5(a) committees, did they?
>
> A Eventually they were approved by the Traffic Executive Association of the Eastern Railroads.
>
> Q After the presidents of the railroads made the decisions, isn't that right?
>
> A The railroads had to agree to something before they submitted it to the committees. They were based upon the economic necessities—"
>
> • • •

"Q In this case the President's Conference decided it for you, didn't they?

A I won't say that. I will say the Traffic Executive Association of the Eastern Railroads decided it for us.

Q They told you what the rates would be?

A They approved the rates.

Q They told you what the rates would be? These rates were not formulated by you for iron ore?

A No, sir. These imports rates.

Q These import rates?

A That is right.

Mr. Gould: No further questions."

6. By the invidious technique of appellees' and intervening defendants' reasoning scrap iron is divorced from the iron and steel category thereby eliminating the odious freight rate comparisons with iron ore, pig iron and new steel. By a false postulate, scrap iron is determined by the Interstate Commerce Commission and the District Court to have no loading characteristics similar to iron ore, pig iron and new steel despite the fact that for thirty-four years the Federal Courts and the Commission have consistently and without exception indexed, compared and related scrap iron to iron and steel commodities.

7. If the motions to affirm are sustained this Court will provide a sweeping precedent that proceedings in the Interstate Commerce Commission may be conducted in a singular form of "star chamber session" whereby the large economic interests in the United States can sweep into court acting in concert with canned testimony, unload that testimony couched in deliberate language to avoid fundamental cross-examination and then depart the hearing chamber protected by a newly-devised protective shield of "confidential information." No shipper large or small nor any group of shippers can cope with forty-nine Class I railroads and the eleven largest steel mills in Eastern Territory acting as an impregnable line of defense in protecting

"favorite cousin" freight rates. This economic alliance has created an unreasonable burden upon an independent industry, while raw materials and manufactured products of one of the nation's largest industries are transported at subnormal rates. The decision of the District Court affirming the Commission nullifies Sections 1 and 3 of the Interstate Commerce Act as far as scrap iron shippers are concerned because there is no possible remedy for their invoking the Congressional intent embodied in these two sections of the Act if the District Court's decision is affirmed.

For the foregoing reasons, it is respectfully submitted that the motions to affirm of the appellees and intervening defendants be overruled.

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1104 Carew Tower
Cincinnati 2, Ohio
November, 1963.

## PROOF OF SERVICE

I, Howard Gould, one of the attorneys for the appellants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, and also upon the Solicitor General, Department of Justice, Washington 25, D.C., by mailing a copy thereof, properly addressed to said parties, with air mail postage where required and first class postage where permitted, prepaid.

Dated at Cincinnati, Ohio, this 18th day of November, 1963.

Howard Gould

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JOHN F. DAVIS, CLERK

No. 506

In the

# SUPREME COURT OF THE UNITED STATES

October Term, 1963

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FRANK ADAMS & CO., ET AL,
Appellants,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees,

and

BALTIMORE & OHIO RAILROAD CO., ET AL,
Intervening Defendants.

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## PETITION FOR REHEARING

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FRANK ADAMS & CO., ET AL,
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Intervening Defendants.

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## PETITION FOR REHEARING

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### STATEMENT

Pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, Appellants pray that this Court grant a rehearing of its judgment of December 9, 1963, — U.S. —, 11 L. Ed. 2d 269, 32 U.S. Law Week 3209, affirming the motions of the Appellees and Intervening Defendants, and affirming the judgment of the United States District Court for the Southern District of Ohio, Western Division.

Appellants pray that upon consideration hereof, this Court will grant plenary review and order a full hearing on the merits with the filing of briefs and oral arguments.

## REASONS FOR GRANTING REHEARING AND ORDERING PLENARY REVIEW

### 1. The Effect Of Rule 15 On Appellants' Statutory Right Of Appeal

Appellants submit that the summary affirmance of the decision below and the refusal to grant jurisdiction by this Court denies due process of law. By statute (28 U.S.C. §§ 1253, 2101, 49 U.S.C. § 45), Appellants have a right of appeal to this Court encompassing full briefing, oral argument and review of the record adversus summary consideration and disposition on the jurisdictional statement.

The reasoning of Appellants' argument is provided in Mr. Justice Douglas's dissent in *Lineham* v. *Waterfront Commission*, 347 U.S. 439:

> "This case illustrates what I fear is a growing practice of the court of diluting the Act of Congress which gives us jurisdiction of appeals. 28 U.S.C. § 1253, et al. The Congress carved out a group of cases, of which this is one, that comes here of right and is not dependent, as are petitions for certiorari, on a vote of four Justices out of nine for an adjudication by the Court on the merits of the controversy. In recent years the Court has more and more dismissed or affirmed appeals, with no opportunity of counsel to make oral argument and without any opinion by the Court."

Moreover, appeal to the Supreme Court in this case is mandatory, there being no permissive alternate appeal to the Circuit Court of Appeals:

> ". . . appeal from the final judgment of the District Court will lie *only* to the Supreme Court." (Italics added) 49 U.S.C. § 45.

Surely, Congress in limiting appeals to the Supreme Court in cases of this magnitude did not envision the disposal of such appeals by mere review of the jurisdictional statement.

This Court's Rule 15 pertaining to jurisdictional statements requires Appellants to set forth therein:

> ". . . the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution."

The concept of Rule 15 applied to obligatory appeals makes substantially indistinguishable considerations of petitions for *certiorari* and statutory appeals. It is true that Section 1253 does not make mandatory plenary consideration; nevertheless, statutory appeals in order to provide due process must afford not just the opportunity to present a limited statement supporting jurisdiction, but an opportunity to have the record before the Court with oral argument and full briefs directing the errors of the Court below to this Court. Due process of law is no less a package of rights and privileges in the highest Court than it would be in a lower court. What is singularly consistent in this case is that from the Examiner's hearing up through the jurisdictional statement filed in this case, more attention has been paid to avoiding due process than providing it.

It is beyond dispute that a court, as well as a legislative body or an executive, may deny due process or work undue process of law. There can be no constitutional dispute as to the power of Congress to establish the right of appeal it has done by 28 U.S.C. § 1253 and 49 U.S.C. § 45. Congress has not empowered this Court to limit in any way this unqualified right by its own rules or otherwise. There is no perceivable constitutional basis, therefore, for the failure of this Court to accord Appellants such as here presented the full measure of their rights vested in them by Congress. The summary disposition of this appeal can be nothing less here than a deprivation by this Court of Appellants' constitutionally valid statutory right to due process of law in obtaining full and plenary consideration of their appeal. Anything short thereof deprives Appellants of what Congress has enacted they are entitled to obtain. In this respect, Rule 15 forges further links in the chain of denial of due process.

### 2. The Court Below Misapplied Rule 43(b) And The Doctrine Of Privilege

The three-judge Court's *per curiam* affirming the Commission's determination categorically and patently perpetuates erroneously serious errors by the Examiner which denied Appellants due process of law. A particular part of the holding of the lower Court complained of is as follows:

> "Plaintiffs have complained at length that they were denied a fair hearing and due process of law by reason of the limitation placed on their cross-examination of certain witnesses by the Commission. However, a thorough review of the record in this case wherein the burden of showing impropriety in the Commission's conclusion is upon the plaintiffs, considered in the light of plaintiff's arguments, does not bear this out.

> *The plaintiffs did not see fit to recall the witnesses in question on direct examination as their own witnesses and make proffers.*" (Italics supplied)

The Court thus applied the corollary of the last phrase of Rule 43 (b), Federal Rules of Civil Procedure, to the procedure followed by the Examiner. That phrase reads as follows:

> "* * * and may be cross-examined by the adverse party only upon the subject matter of his examination."

At civil trials in the United States courts pursuant to the Federal Rules of Civil Procedure, a party desiring the testimony of a witness produced by an adverse party beyond the scope of the original examination in chief must call the witness as his own for a second examination in chief.

What Appellants were confronted with before the Examiner presented a twofold dilemma. First, did Rule 43 (b) and its sequel of Appellants calling the witnesses as their own after the Examiner barred their cross-examination, properly apply to that Interstate Commerce Commission hearing? Secondly, what could have been accomplished by Appellants recalling the recalcitrant witnesses as their own after their cross-examination had been barred upon the grounds of privilege?

Section 12, Title 49, United States Code, statutorily impels the attendance and testimony of witnesses and the production of documents in evidence at a hearing such as was had here. By sub-section (5) *ibid*, witnesses are to "be carefully examined", which implies nothing less than full and complete examination. A full and complete hearing is envisaged by the statute. *United States* v. *Northern Pacific R. Co.*, 288 U.S. 490; *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 284 U.S. 248; *Georgia Public Service Commission* v. *United States*, 283 U.S. 765; *Interstate*

*Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U.S. 88; *United States* v. *Illinois Central R. Co.*, 291 U.S. 457. These holdings postulate that all parties should be given ample opportunity to show fairly, both by evidence and argument, whether the action sought to be had is proper or not by the standards of justice and law. *New England Divisions Case*, 261 U.S. 184. Though the Commission has wide discretion in formulating appropriate solutions solving a technical and complex matter before it, a procedure followed by it should be *fairly* adapted to the unique circumstances of the particular case. *Secretary of Agriculture* v. *United States*, 347 U.S. 645. But further, in exercise of its discretion, it has never been statutorily provided nor judicially held that the Federal Rules of Civil Procedure, notably Rule 43 (b), apply or are binding upon the Commission.

> "The commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties." *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U.S. 88 at p. 93.

See also *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25; *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U.S. 117.

This Court "* * * must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499, 511. The situation here is not as reviewed by the Court in *Swift & Co.* v. *United States*, 343 U.S. 373. Therein, there was patently a complete record and no exclusion of critical testimony. The corollary thereto is necessarily that it is not the duty of the courts to sustain the Commission when there is not a com-

plete record, but to take the opposite action. On this score, dissimilarity of this case with *Ellis* v. *Interstate Commerce Commission*, 237 U.S. 434, has to be emphasized. Here the witnesses whose cross-examination was barred were not before the Commission as *strangers* into whose affairs the Examiner barred inquiry. These witnesses were for intervening defendants, who were actual parties to the case adverse to complainants-appellants. There are thus narrow but most vital and fundamental questions of due process upon which pivot the *per curia* below and here.

We find no precedent supporting in general, in administrative hearings or court trials between private parties, the premise that denial of cross-examination *per se* constitutes due process. If such denial here be based upon the last phrase of Rule 43(b), then it has to be conceded that even if the rule were a permissive guide to the Examiner and not mandatorily incumbent upon him to follow, the cross-examination sought was directly "upon the subject matter" of the examination in chief. *Ibid.* Thus (a) under the general rules of fairness in hearing and completeness of the record indicated to be necessary by this Court's decisions above cited for there to be due process, or (b) on the strict technicalities of Rule 43(b), the record is not complete. All of the evidence was prevented from being presented by the barring of the cross-examination. There was thereby an abuse of discretion and power of the Examiner. See *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457.

> "• • • the purposes of the act call for a *full inquiry* by the Commission into all the circumstances and conditions pertinent to the questions involved." (Italics provided). *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U.S. 184, 196.

Without a complete record before this Court, there can be no basis for its own *per curiam* to constitute due process for there is no way for this Court to know, in the absence of a complete record, what the decision means. *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co., supra.*

A mystifying sentence from the *per curiam a qua* is as follows:

> "In any event, the areas of inquiry which were closed to plaintiffs by the restrictions complained of could not have produced evidence inconsistent with the Commission's determinations."

With what particular kind or power of juridical crystal ball the three-judge Court was equipped in which it viewed the cross-examination not made is not known to Appellants nor disclosed by the record. We are aware of no judicial process, procedure or method by which testimony *not taken* can be judicially considered and weighed and such a fact conclusion be reached thereon. The quoted statement by the lower Court is in itself erroneous and deprives Appellants of due process. The complexity of the record before the Commission should not have mandated an affirmance by the Court below particularly since error dictated a remand.

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 1)*, supra, p. 70; *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 2)*, 294 U.S. 79; *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U.S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is

> the need, when power has been bestowed so freely, that the 'inexorable safeguard' (*St. Joseph Stockyards Co.* v. *United States*, 298 U.S. 38, 73) of a fair and open hearing be maintained in its integrity. *Morgan* v. *United States*, 298 U.S. 468, 480, 481; *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, supra. The right to such a hearing is one of 'the rudiments of fair play' (*Chicago, M. & St. P. Ry. Co.* v. *Polt*, 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 1)*, *(No. 2)*, supra; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 682. Cf. *Norwegian Nitrogen Co.* v. *United States*, supra. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." *Ohio Bell Tel. Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292, 304.

But the Court *a qua* may have, and probably did, completely misinterpret the record in concluding it to be necessary (a) to reach into the technicalities of Rule 43(b), and (b) to formulate a fact conclusion upon testimony not allowed to be taken, as bases for affirming the Commission. It has to be re-emphasized that the Examiner barred the cross-examination because the evidence thus sought to be elicited was confidential information. The latter phrase can be no more than a synonym for "privilege", which has definite and restrictive meaning in the law. The three-judge Court completely ignored the invalidity on the face of the record of the granting of a plea of privilege by the Examiner. Due process is denied, therefore, on three scores: the original error of the Examiner in barring cross-examination completely, his error in not holding that privilege (if any) was waived, and the failure of the lower Court to consider and reverse those errors of the Examiner.

Exactly what species of privilege the Examiner protected is not shown clearly by the record. It is certainly not, however, the purely personal privilege of an individual against self-incrimination not available to a corporation. See *United States* v. *White*, 322 U.S. 694, and prior decisions cited at 322 U.S. 699. Cf. particularly *Wilson* v. *United States*, 221 U.S. 361. None of the witnesses were attorneys, so that the attorney-client privilege could not be involved (*Radiant Burners, Inc.* v. *American Gas Association*, (C.A. 7, June 28, 1963), 320 F. 2d 314, reversing 207 F. Supp. 771), nor was the information sought an attorney's work product (*Hickman* v. *Taylor*, 329 U.S. 495). There is no possibility of there being involved the privilege of a physician or minister of religion.

All that remains is business secrecy. This is not a generally recognized privilege in controversies such as that here presented. At any event, even business secrecy to be accorded a status of privilege has to encompass all of four generally accepted fundamental conditions necessary

> "* * *to the establishment of a privilege against the disclosure of communications:
>
> (1) The communication must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which, in the opinion of the community ought to be sedulously *fostered*.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.
>
> Only if these four conditions are present should a privilege be recognized." 8 *Wigmore, Evidence* § 2285 (McNaughton Rev. 1961).

If any of these criteria are present, certainly the fourth is not, and the privilege was erroneously granted by the Examiner and erroneously perpetuated by the Court *a qua*.

Most privileges are statutory. It is universally the rule, though, that even as to a statutory privilege of a most sanctified nature, e.g., the physician-patient privilege, such may be waived by the voluntary testimony on the subject matter of the beneficiary of the privilege. This opens the door not only to his own cross-examination but also to examination of the witness otherwise barred by privilege. See 58 Am. Jur. 253, "Witnesses" § 447. Thus, here, the door was opened by the voluntary appearance of the witnesses either personally or by sworn statements. To deny cross-examination on the subject matter of the appearance of those witnesses in chief was to commit error; also had there been privilege, the Examiner erred in not ruling it was waived. These errors, the three-judge Court perpetuated.

Thus, what is tantamount to a whole industry has been denied due process of law by an administrative body, perpetuated and multiplied by a statutory three-judge Court, which, if allowed to stand, will destroy the industry. At the very least, these manifest errors justified at least a *per curiam* here remanding the case for a complete hearing by the Commission rather than the converse.

Respectfully submitted,

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HOWARD GOULD

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ATTORNEYS FOR APPELLANTS

Dated: January 17, 1964

## CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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Counsel for Appellants

## PROOF OF SERVICE

I, David Reichert, one of the attorneys for the Appellants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, and also upon the Solicitor General, Department of Justice, Washington 25, D.C., by mailing a copy thereof, properly addressed to said parties, with air mail postage where required and first-class postage where permitted, prepaid.

Dated at Cincinnati, Ohio, this 17th day of January, 1964.

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David Reichert